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No. (1)

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1990

STEPHEN JUZWIN and MARY JUZWIN, his wife,

Petitioners,

vs.

ASBESTOS CORPORATION LTD., individually and as successor to Johnson's Company; CAREY CANADIAN MINES; AMTORG TRADING CORPORATION; and METROPOLITAN LIFE INSURANCE COMPANY; FLINKOTE MINES, LTD.; TURNER & NEWALL, P.L.C.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

GARRUTO, GALEX & CANTOR
Attorneys for Petitioners
180 Tices Lane
East Brunswick, New Jersey 08816
(201) 214-1800

BRYAN D. GARRUTO
JANE B. CANTOR
Of Counsel

PROFESSOR ALLAN STEIN
On the Petition

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QUESTIONS PRESENTED

1. Does the Commerce Clause of the United States Constitution prohibit a state from withholding a statute of limitations defense from corporate defendants who have failed to appoint an agent for service of process where such appointment does not, according to the state courts, subject the corporation to the general jurisdiction of the state courts?

2. If the Commerce Clause does prohibit such a tolling provision, should plaintiffs, who filed suit prior to the Court of Appeals' invalidation of the state statute, be subjected to a statute of limitations defense?

LIST OF PARTIES

The parties to the proceedings in the courts below were as follows:

Stephen Juzwin and Mary Juzwin (plaintiff-appellee below);

Asbestos Corporation Ltd. (defendant below);

Carey Canadian Mines (defendant-appellant/third-party plaintiff below);

Amtorg Trading Corporation (defendant/third-party plaintiff below);

Metropolitan Life Insurance Company (defendant below);

Flintkote Mines Ltd. (defendant/third-party defendant below);

Turner & Newall, P.L.C. (defendant/third-party defendant below);

Leonard J. Buck, Inc. (appellee/third-party defendant/fourth-party plaintiff below);

National Gypsum Company (third-party defendant below);

Lac D'Amiante du Quebec Limitee (third-party defendant below);

Bell Asbestos Mines Ltd. (third-party defendant below);

Associated Ore & Metal Corp., Ltd. (fourth-party defendant below);

Attorney General of New Jersey (plaintiff-intervenor below);

Wilentz, Goldman & Spitzer (Amicus Curiae below).

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No.

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OPINIONS BELOW

The denial of the petition for rehearing *en banc* by the United States Court of Appeals for the Third Circuit is reproduced as Appendix F (75a). The opinion of the United States Court of

Appeals for the Third Circuit is published at 900 F.2d 686 (1990) and is reproduced as Appendix A (1a).

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Third Circuit for which review is sought was entered on April 10, 1990. On May 9, 1990, the Court of Appeals denied petitioner's timely petition for rehearing *en banc*. The jurisdiction of the Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article I, § 8 of the United States Constitution, provides in relevant part:

> The Congress shall have Power . . .
> To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes; . . . .

N.J. Stat. Ann. § 2A:14-22 (West 1987), provides:

> If any person against whom there is any of the causes of action specified in sections 2A:14-1 to 2A:14-5 and 2A:14-8 [53a-56a], or if any surety against whom there is a cause of action specified in any of the sections of Article 2 of this chapter, is not a resident of this State when such cause of action accrues, or removes from this State after the accrual thereof and before the expiration of the times limited in said sections, or if any corporation or corporate surety not organized under the laws of this State, against whom there

is such a cause of action, is not represented in this State by any person or officer upon whom summons or other original process may be served, when such cause of action accrues or at any time before the expiration of the times so limited, the time or times during which such person or surety is not residing within this State or such corporation or corporate surety is not so represented within this State shall not be computed as part of the periods of time within which such an action is required to be commenced by the section. The person entitled to any such action may commence the same after the accrual of the cause therefor, within the period of time limited therefor by said section, exclusive of such time or times of non-residence or nonrepresentation.

A corporation shall be deemed represented for purposes of this section if the corporation has filed with the Secretary of State a notice designating a representative to accept service of process. [51a].

STATEMENT OF THE CASE

Petitioners Stephen and Mary Juzwin brought suit in the Superior Court of New Jersey in July, 1987 to redress Stephen's injuries allegedly caused by his exposure to asbestos manufactured by, among others, respondent Carey Canada, Inc., a Canadian corporation. The case was removed by defendants to the United States District Court for the District of New Jersey.

Respondent then moved to dismiss the claim pursuant to New Jersey's two year statute of limitations, asserting that the Juzwins' claim expired two years after Stephen was diagnosed as having an asbestos-related injury in August, 1982. The District Court

denied the motion on the basis of the New Jersey tolling statute, N.J. Stat. Ann. § 2A:14-22 (West 1987), which suspended the running of the statute of limitations for any period in which respondent was not represented in the state by an agent for service of process (51a).

As respondent did not designate any representative within the state to receive process during the period after petitioner's claim arose, the court held the tolling statute applicable and denied the motion (27a). The court rejected respondent's contention that the statute imposed an impermissible burden on interstate commerce but certified the question to the Court of Appeals pursuant to 28 U.S.C. § 1292(b) (73a). The Attorney General of New Jersey intervened to defend the constitutionality of the statute (49a).

The Court of Appeals reversed, holding that the question was controlled by this Court's recent decision in *Bendix Autolite Corp. v. Midwesco Enterprises, Inc.*, 486 U.S. 888 (1988), 900 F.2d 686 (3d Cir. 1990) (1a). The court reached this conclusion notwithstanding the fact that the New Jersey statute had been construed by the New Jersey courts not to subject registering corporations to general jurisdiction in New Jersey. *Armenti v. Carey Canada, Inc.*, Doc. No. AM-177-88-T3F (November 4, 1988) (unpublished order) (47a). *See also, Cutler v. Raymark Industries*, 707 F. Supp. 168 (D.N.J. 1989) (rejecting Commerce Clause attack on tolling statute by construing corporate registration under the statute to not subject corporation to general jurisdiction). The Court of Appeals purported to accept, *arguendo*, the correctness of that statutory construction. 900 F.2d at 689 (7a).

The court, nonetheless, held the statute invalid under both the "heightened scrutiny" test reserved for statutes that discriminate against interstate commerce, 900 F.2d at 690 (11a), as well as under the more deferential "balancing test" of *Pike*

v. Bruce Church, Inc., 397 U.S. 137, 142 (1970). *Id.* at 691-92 (12a). The sole basis for the court's conclusion that the statute imposed an unreasonable burden on interstate commerce was that out-of-state business might misconstrue the statute; since nonresident corporations could erroneously assume that they were required to submit to the general jurisdiction of the state courts in order to preserve their statute of limitations defenses, the court found that the statute placed an unreasonable burden on interstate commerce, even though that was not the intent of the New Jersey legislature. *Id.* at 691 (14a).

The court also held, without the benefit of any factual determinations by the District Court, that its ruling should be given retroactive application since petitioners should have been aware of the constitutional infirmity of the statute prior to the court's ruling; any reliance by petitioners on the statute was therefore unreasonable. *Id.* at 691-96 (12a-25a).

REASONS FOR GRANTING THE WRIT

In *Bendix Autolite Corp. v. Midwesco Enterprises, Inc.*, 486 U.S. 888 (1988), this Court struck down an Ohio statute that tolled the statute of limitations against defendants who previously failed to submit themselves to the general jurisdiction of the Ohio courts by appointing an agent for service of process. The instant petition arises out of New Jersey's attempt to give a saving construction to its statute in the light of *Bendix* by holding that the appointment of an agent for service of process pursuant to the tolling statute does not subject the defendant to general jurisdiction in New Jersey. The state thus attempted to redress constitutionally its interest in ameliorating the hardship caused by the running of the statute of limitation in cases where it could be difficult to identify, locate and serve a defendant not present in the state.

The opinion below rendered that attempt futile by virtually

ignoring the state courts' statutory construction and finding an impermissible burden on commerce in the potential for nonresident corporations to misconstrue the statute.

At least twelve states have statutory provisions that toll the statute of limitations against absent defendants. Most of those statutes are subject to the same constitutional challenge recognized by the court below. If other courts follow the Third Circuit's lead, there will be no opportunity to avoid the constitutional invalidation of those statutes through the use of narrowing statutory constructions.

Moreover, any *legislative* attempt to reconcile nonresident tolling statutes with *Bendix* has been undermined by the Third Circuit's conclusion that the statute was fatally overinclusive. The court held that New Jersey lacked a legitimate interest in ameliorating the impact of the statute of limitations where, because of defendant's absence from the state, service was rendered more difficult, but not impossible. 900 F.2d at 690 (10a). That holding was in direct conflict with this Court's decision in *G.D. Searle & Co. v. Cohn*, 455 U.S. 404 (1982), a decision that rejected the *identical* overinclusivity attack on the New Jersey tolling statute asserted in the guise of an equal protection challenge. The decision below does not even attempt to distinguish *G. D. Searle*.

Thus, further guidance from this Court is necessary to avoid a wholesale and unwarranted invalidation of state legislation under *Bendix* and to facilitate this Court's well-established preference for avoiding constitutional adjudication though the use of narrowing constructions.

The impact of the lower court's judgment on New Jersey litigants is particularly pernicious. The intermediate appellate court of New Jersey has upheld the constitutionality of the statute. *Armenti v. Carey Canada*, No. AM-177-88-T3F (Super. Ct. N.J.

November 4, 1988) (unpublished order) (47a). Thus, unless the Supreme Court of New Jersey reverses that holding, litigants in federal court will be barred from bringing claims cognizable in the state courts until this Court resolves the question.

The opinion of the court below was a flagrant misapplication of this Court's Commerce Clause precedents. It subjected the statute to the heightened scrutiny of *Philadelphia v. New Jersey*, 437 U.S. 617 (1978), solely because an erroneous conclusion that the statute on its face applies exclusively to nonresidents. In fact, the statute does not impose any burden on nonresident corporations that is not imposed equally on domestic corporations. While nonresident corporations must register with the state to preserve the statute of limitations defense, domestic corporations must appoint an agent for service of process as a precondition to obtaining corporate status. *See N.J. Stat. Ann.* §§ 14A:4-1 to 4-5 (West 1989) (53a-56a). The tolling statute does not, therefore, create any competitive advantages for New Jersey corporations or raise any entry barriers to the New Jersey markets, the *sine qua non* of a Commerce Clause violation under *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117 (1978).

Given the absence of any impact of the statute on interstate commerce, the court should have been relatively deferential to New Jersey's interest in the provision under the *Pike* balancing test. Instead, the court applied a form of a balancing test that was tantamount to strict scrutiny. The panel imputed to the statute the narrow purpose of assisting only those plaintiffs who were unable to serve defendants beyond the jurisdiction of the state courts. It then found, in flagrant disregard of *G. D. Searle v. Cohn*, the statute fatally overinclusive for extending the tolling principle to all absent defendants. In fact, as recognized by *G. D. Searle*, New Jersey has a legitimate interest in tolling the statute where timely service has, by defendant's absence, been rendered more difficult although not impossible. Rather than balance New

Jersey's interest in the statute, the court below simply substituted its own judgment as to the wisdom of the tolling statute for that of the New Jersey legislature.

I.

THE LOWER COURT'S DISREGARD OF THE SAVING CONSTRUCTION GIVEN TO THE STATUTE BY THE NEW JERSEY COURTS UNDERMINES A FUNDAMENTAL TENET OF JUDICIAL FEDERALISM AND THREATENS THE VALIDITY OF NUMEROUS SIMILAR STATUTES IN OTHER STATES.

State interests in ameliorating the impact of the statute of limitations for claims against absent parties are reflected in numerous state nonresident tolling provisions similar to the law struck down by the Court of Appeals. *See, e.g.*, Cal. Civ. Proc. Code § 351 (Deering 1988)[1]; Colo. Rev. Stat. § 13-80-118 (1989); Del. Code Ann. tit. 10, § 8117; Hawaii Rev. Stat. § 657-18, 480-24 (1989); Ill. Rev. Stat. ch. 110, § 613-208 (1988); Kan. Stat. Ann. § 60-517 (1988); Md. Cts. & Jud. Proc. Code Ann. § 5-204 (1989); Okla. Stat. Ann. tit. 12, § 98 (West 1988); Wis. Stat. § 180.847 (1988) (Appendix E, 64a-72a). By definition, those statutes offer defendants the option of preserving potential statute of limitation defenses by maintaining some presence in the state so as to facilitate personal service of process. In the case of corporate defendants not chartered in the state, that amenability to personal service of process can only be achieved by appointment of a representative

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1. The California statute was held violative of the Commerce Clause in *Abramson v. Brownstein*, 897 F.2d 389 (9th Cir. 1990). Unlike the instant case, the only way defendant there could have asserted the statute of limitations defense was by maintaining an actual presence in the state, a burden the Court of Appeals considered equivalent to the general jurisdiction burden imposed by the Ohio statute in *Bendix*. 897 F.2d at 392.

as the out-of-state corporation has no physical "presence", as such. *International Shoe Co. v. Washington*, 326 U.S. 310, 318 (1945) (characterizing "presence" of out-of-state corporation as "legal fiction"). *See. e.g.*, Md. Cts. & Jud. Proc. Code Ann. § 5-204 (1989).

As this Court made clear in *G. D. Searle & Co. v. Cohn*, 455 U.S. 404, 410 (1982), the New Jersey tolling statute is a rational means for the state to take account of the obstacles faced by plaintiffs in suing a nonresident defendant in a timely fashion. Even where the nonresident defendant is within the reach of the state long-arm jurisdiction, as apparently was the respondent here, the added difficulty in identifying, locating, and serving the nonresident defendant justifies the extension of the statute of limitations for such claims.

This Court's recent decision in *Bendix Autolite* imposed an important limit on tolling statutes: a state may not condition the availability of a statute of limitations defense on a defendant's appointment of an agent for service of process where that appointment has the effect of subjecting the defendant to the general jurisdiction of the state courts.[2] Such a condition, the Court held, gives resident businesses an unfair competitive advantage in violation of the Commerce Clause: nonresident businesses will be dissuaded from competing in the state's markets if forced to choose between waiving their statute of limitations defenses or submitting to the general jurisdiction of the state courts

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2. A defendant subject to general jurisdiction is required to defend in the state courts any claim against it regardless of the claim's connection with the state. 486 U.S. at 893. *See generally, Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408 (1984) (describing due process limitations on assertions of general jurisdiction).

for claims against them arising anywhere in the United States.[3] 486 U.S. at 892-93.

It was this, and only this, coercion that produced the twin evils prohibited by the Commerce Clause: Ohio attempted to use its power over a local transaction to obtain general jurisdictional authority over out-of-state controversies, *Edgar v. MITE Corp.*, 457 U.S. 624 (1982); and out-of-state corporations were thereby dissuaded from entering the Ohio markets, creating a competitive advantage for domestic corporations. *Dean Milk Co. v. Madison*, 340 U.S. 349 (1951).

The *Bendix* decision in no way questions the validity of nonresident tolling statutes that do not condition the availability of statute of limitations defenses on the registrant's submission to general jurisdiction.[4] The absence of that condition

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3. While Ohio also, of course, asserted general jurisdiction over Ohio corporations, the statute nevertheless erected entry barriers since out-of-state corporations were placed at a competitive disadvantage in the Ohio market: if the out-of-state corporation chose to appoint an agent for service of process, it would be subject to general jurisdiction in both its home state as well as the other state, where resident businesses would be subject only to the general jurisdiction of their home state. The New Jersey statute generates no comparable advantage for New Jersey corporations.

4. In contrast to the situation here, the court in *Bendix* expressly noted that the Ohio statute was not susceptible to such a saving construction:

> The suggestion that Midwesco had the simple alternatives of designating an agent for service of process in its contract with Bendix or tendering an agency appointment to the Ohio Secretary of State is not persuasive. Initially, there is no statutory support for either option, and it is speculative that either device would have satisfied the Ohio requirements for the continued running of the limitations period. In any event, a designation with the Ohio Secretary of State of an agent

(Cont'd)

fundamentally changes the impact of the statute on interstate commerce: no business will be dissuaded from entering the state markets simply because it is required to register with the Secretary of State in order to preserve potential statute of limitations defenses. Where, as in the case of the New Jersey statute, registration has no affect on the registrant's amenability to personal jurisdiction, the only "burden" imposed on commerce is the *de minimus* cost of mailing notice to the state authorities.[5] *Cf.*, *G. D. Searle & Co. v. Cohn*, 455 U.S. at 413 (case remanded on Commerce Clause grounds to determine whether statute of limitations defense would be preserved simply by notifying the state of defendant's presence in the state).

Thus, in normal course, the impact of *Bendix* on the multitude of nonresident tolling statutes would be that the lower courts would have the opportunity to construe tolling statutes consistent with the constitutional limitations articulated by the Court. That process of avoiding the constitutional invalidation of state legislation through statutory construction is a central feature of judicial federalism. By giving states the opportunity to narrowly construe their laws in light of judicially articulated constitutional limits, the federal courts can avoid unnecessary friction with the states and needless displacement of state law. *See Frisby v. Schultz*, 487 U.S. 474, 483 (1988) (lower court should have adopted construction of state law that would have avoided constitutional

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(Cont'd)

> for the service of process likely would have subjected Midwesco to the general jurisdiction of Ohio courts over transactions in which Ohio had no interest.

486 U.S. at 894-95.

5. There is only a nominal charge of $10 for registering the identity of the agent with the Secretary of State, N.J.S.A. 22A:4-1(a). Only corporations presently doing business in the State of New Jersey are subject to any tax. *See* N.J.S.A. 54:10A-2

difficulties): *Virginia v. American Booksellers Association*, 484 U.S. 383, 396 (1988) (question of state law certified to state courts to obtain construction that might avoid need for constitutional adjudication); *Harrison v. NAACP*, 360 U.S. 167, 176-77 (1959) (abstention is appropriate where state statute is susceptible of construction by state judiciary which might avoid necessity of constitutional issue).

The decision of the court below turns that process on its head. New Jersey's commitment to maintaining a constitutional form of the tolling statute is manifest. Within a year of *Coons v. American Honda Motor Co.*, 94 N.J. 307, 463 A.2d 921 (1983), *cert. denied*, 469 U.S. 1123 (1985), which held that an earlier version of the statute imposed excessive burdens of interstate commerce, the New Jersey legislature amended the statute to eliminate the requirement that nonresident corporations obtain a certificate of authority as a condition of asserting the statute of limitations. N.J. Pub. L. 1984 c. 131 (August 23, 1984). Thus, the state courts, as well as two federal district courts, had no difficulty in determining that the legislature would want the new statute construed in conformity with *Bendix*. *Armenti, supra; Cutler v. Raymark Industries*, 707 F. Supp. 168, 171 (D.N.J. 1989). *But see Robinson v. Visual Packaging, Inc.*, 705 F. Supp. 216 (D.N.J. 1989). The statute is silent as to the jurisdictional effect of registration, and the courts held that no jurisdictional effect would be imputed to registration. This was also the position taken by the New Jersey Secretary of State, who so informed any person making inquiry. *Cutler v. Raymark Industries*, 707 F. Supp. at 171.[6] The court below all but ignored those decisions. The court

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6. The court cited, *inter alia*, the following data:

> Such a limiting construction of 2A:14-22 is further suggested by the practice of the New Jersey Secretary of State in accepting designation of representatives for service of process.

(Cont'd)

based its conclusion that the statute imposes excessive burdens on interstate commerce not on the actual meaning of the statute as construed by the New Jersey courts, but on the potential for nonresidents to *misconstrue* the statute. The court feared that nonresident corporations might erroneously conclude that registration would subject them to general jurisdiction in New Jersey:

> Since the New Jersey statute does not *on its face* indicate whether designation of an agent for service of process subjects a corporation to general or limited jurisdiction, it is impossible for a foreign corporation to discern from the statute's wording what the consequences of designating an agent will be. Thus, prudence dictates that foreign corporations wishing to avail themselves of New Jersey's statute of limitations must inquire as to the consequences of designation under the statute. Moreover, given the wording of the tolling statute, foreign corporations may be understandably reluctant to rely on an informal practice of an administrative or executive body to protect

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(Cont'd)

> Plaintiff has supplied the affidavit of Paul E. Wermuth legal advisor to the New Jersey Secretary of State, who states that, upon the advice of the New Jersey Attorney General, the Secretary of State permits foreign corporations to limit their designations of representatives for service of process only to causes of action that would otherwise have the requisite minimum contacts with New Jersey. Wermuth Affidavit, p. 5. The New Jersey Attorney General, in his capacity as intervenor in this case, has also represented to the court that foreign corporations can limit the jurisdictional effect of their designation of a representative for service of process.

Id. at 171.

> themselves from exposure to the general jurisdiction of New Jersey.

900 F.2d at 691 (emphasis added) (footnote deleted) (13a-14a).

In so holding, the Court of Appeals abandoned the principle that unnecessary constitutional adjudication should be avoided if a statute can fairly be given a constitutional interpretation. The decision below needlessly requires a legislative revision of the statute simply to codify the interpretation already given to the statute by the New Jersey courts. The only possible benefit of such a revision, providing clearer guidance to nonresident corporations, would have been equally obtained by the court's *affirmance* of the District Court. In so holding, the court could have made well known that designation of an agent pursuant to the statute does not subject the registrant to general jurisdiction.

The danger posed by the decision goes beyond the needless invalidation of the New Jersey statute. If other courts follow the lead of the Third Circuit, any tolling statute that fails to state on its face that registering corporations are not subjected to general jurisdiction will be vulnerable to judicial invalidation regardless of the strength and clarity of contrary state legislative intent.

Specific guidance from this Court is thus necessary to prevent the needless wholesale displacement of state tolling statutes.

II.

THE DECISION OF THE PANEL BELOW WAS A MISAPPLICATION OF THIS COURT'S PRECEDENTS.

A. The Court Below Erroneously Subjected the New Jersey Statute to Strict Scrutiny Where No Discriminatory Burden Was Imposed on Interstate Commerce.

Judicial review of state statutes challenged under the Commerce Clause are governed by a two-track standard, similar to the two-tiered scrutiny of the Equal Protection Clause. Where a statute expressly erects a discriminatory barrier to interstate commerce, it must withstand a heightened scrutiny: it must appear that there is no means less restrictive of interstate commerce that will achieve an important state legislative objective. *Philadelphia v. New Jersey,* 437 U.S. 617 (1978). But "[w]here the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits," *Pike v. Bruce Church, Inc.,* 397 U.S. 137, 142 (1970). In short, the less that a statute burdens interstate commerce, the more latitude the state is granted to redress a legitimate domestic interest.

While "there is no clear line separating the category that is virtually per se invalid under the Commerce Clause, and the category subject to the *Pike v. Bruce Church* balancing approach." *Brown-Forman Distillers v. New York State Liquor Authority,* 476 U.S. 573, 579 (1986), the distinguishing characteristic of cases applying heightened scrutiny is that interstate commerce has been singled out for discriminatory treatment. Interstate commerce, in those cases, has been subjected to a burden inapplicable to domestic transactions thereby creating competitive advantages for local businesses. *See, e.g., Philadelphia v. New Jersey,* 437 U.S.

617 (1978) (Pennsylvania garbage excluded from New Jersey disposal facilities); *New Energy Co. v. Limbach,* 486 U.S. 269 (1988) (grant of tax credit to sellers of ethanol produced in Ohio); *Sporhase v. Nebraska,* 458 U.S. 941 (1982) (Nevada law restricted transport of water out of state); *Hughes v. Oklahoma,* 441 U.S. 322 (1979) (statute forbidding export of minnows); *Dean Milk Co. v. Madison,* 340 U.S. 349 (1951) (all milk sold in state must be locally processed); *Maine v. Taylor,* 477 U.S. 131 (1986) (sustaining a Maine statute that required all bait used in fishing to be of Maine origin). No such discrimination exists here, and no competitive advantages were generated.

The sole basis for the lower court's application of the heightened scrutiny standard was its erroneous conclusion that the statute, on its face, "applies to out-of-state corporations but not to New Jersey corporations." 900 F.2d at 689 and n.3 (9a). The New Jersey tolling statute does not, in fact, single-out non-citizens for sanction. The tolling statute applies neutrally to *all* defendants who are not subject to personal service of process in the state. *Even a citizen who temporarily leaves the State is explicitly subject to the tolling provision for the period in which she was absent and not subject to personal service of process.*[7]

In the case of corporate defendants, amenability to personal service of process is measured not by physical "presence" in the State, but by the presence of agent authorized to receive process. It was precisely for this reason that the statute was amended in 1949: the previous tolling statute suspended the statute of limitations for claims against *all* absent defendants, and this had

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7. While finding the California tolling statute violative of the Commerce Clause, the Court of Appeals for the Ninth Circuit declined to subject the California statute to heightened scrutiny for this reason; absent parties were treated alike regardless of citizenship. *Abramson v. Brownstein*, 897 F.2d 389, 392 (9th Cir. 1990). The New Jersey statute, in this regard, is functionally equivalent to the California law.

been judicially construed to mean that out-of-state corporations could *never* assert the statute of limitations. Corporate registration was accordingly added as an option, not to penalize corporate defendants, but to put them on the same footing as any other defendant. *Velmohos v. Maren Engineering Corp.*, 83 N.J. 282, 416 A.2d 372, 377 (1980), *vacated on other grounds*, 455 U.S. 985 (1982) *quoting* Statement Accompanying Assembly Bill No. 467 (1949).

Other provisions of New Jersey corporate law already guarantee the amenability of domestic corporations to personal service within the state. All New Jersey corporations must designate such an agent as condition to the grant of their corporate status. *See* N.J. Stat. Ann. § 14A:4-1 (West 1990) (56a). They are accordingly incapable of "leaving" the state. The tolling statute, accordingly, only addresses the problem of absent nonresident corporate defendants. No out-of-state corporation is subjected to a registration burden that is not applied equally to New Jersey corporations. No out-of-state corporation is consequently disadvantaged in competing in or outside of New Jersey. *Accord, Exxon Corp. v. Governor of Maryland*, 437 U.S. 117 (1978) (there can be no Commerce Clause violation absent the erection of an entry barrier to the state markets).

The formalistic approach employed by the Court of Appeals would subject even long-arm statutes to strict scrutiny since they assert jurisdiction only over persons residing out-of-state. N.J. Court Rule 4:4-4(c)(1). Obviously, the assertion of jurisdiction against persons residing in the state through other jurisdiction statutes renders the separate long-arm provisions non-discriminatory, and thus non-suspect.

B. The Lower Court's Application of the *Pike* Balancing Test Failed to Recognize New Jersey's Legitimate Interest in Its Tolling Statute, in Flagrant Disregard of this Court's Decision in *G. D. Searle & Co v. Cohn.*

Given the virtually non-existent impact of the New Jersey statute on interstate commerce, and the even-handed imposition of the registration requirement on foreign and domestic corporations alike, the court should have given substantial deference to New Jersey's interest in the registration requirement under the *Pike* balancing test: a statute "will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." 397 U.S. at 142. Instead, the court exercised what was tantamount to very strict scrutiny: it held the statute fatally overbroad because tolling was not limited to claims against defendants beyond the long-arm jurisdiction of the state:

> As the district court recognized, New Jersey has a legitimate interest in "assist[ing] New Jersey citizens to pursue their claims against foreign corporations." New Jersey Senate Judiciary Committee's Statement to Senate Bill 953 (1984), dated February 23, 1984. The tolling statute is designed to further that interest by suspending "the running of the statute of limitations for foreign corporations that are not represented in New Jersey and thus cannot be reached with service of process." However, "[t]he purpose of the statute is not confined to providing relief when service is impossible. Even where absent residents could be served outside the State, the statute still provides for tolling." . . . We think New Jersey's legitimate interest could adequately be protected by a statute that permits a court to order the statute of

> limitations to be tolled when it is satisfied that, in spite of diligent efforts, long-arm service cannot be effectuated either because the corporation is beyond the reach of the long-arm rule or because it cannot be found for mail service.

900 F.2d at 690 (10a) (finding insufficient state interest under heightened scrutiny). *Accord, id.* at 691 (finding insufficient state interest under *Pike* balancing test) (12a-13a).

The lower court's conclusion that New Jersey had no legitimate interest in tolling the statute where service was not "impossible" was in flagrant disregard of this Court's decision in *G. D. Searle & Co. v. Cohn*, 455 U.S. 404, 410-11 (1982). In denying an equal protection challenge to an earlier version of the same statute at issue here, this Court rejected unequivocally the very argument relied upon by the court below:

> [R]ational reasons support tolling the limitation period for unrepresented foreign corporations despite the institution of long-arm jurisdiction in New Jersey. First, the unrepresented foreign corporation remains potentially difficult to locate. Long-arm jurisdiction does not alleviate this problem, since a New Jersey plaintiff must find the unrepresented foreign corporation before it can be served. . . .
>
> Second, the institution of long-arm jurisdiction in New Jersey has not made service upon an unrepresented foreign corporation the equivalent of service upon a corporation with a New Jersey representative. The long-arm rule, N.J.Ct.Rule 4:4-4(c)(1) (1969), prescribes conditions upon extraterritorial service to ensure

> that New Jersey's long-arm jurisdiction has been properly invoked. In *Velmohos*, the New Jersey Supreme Court explained: "Under our rules, extra-territorial service is not simply an alternative to service within the State. Plaintiffs may not resort to out-of-state service unless proper efforts to effect service in New Jersey have failed. The rule imposes a further burden on a plaintiff by requiring him to gather sufficient information to satisfy a court that service is 'consistent with due process of law.' " . . .
>
> Thus, there are burdens a plaintiff must bear when he sues a foreign corporation lacking a New Jersey representative that he would not bear if the defendant were a domestic corporation or a foreign corporation with a New Jersey representative.

Id. (citations omitted). The court below did not even attempt to distinguish *Searle*.

The statutory benefits recognized by *Searle* are particularly significant in cases such as the instant one where plaintiffs are charged under New Jersey substantive law with the significant burden of identifying and joining the specific producer of the commonly-produced product to which they were exposed long ago, manufactured years before suit, by a myriad of existing and defunct companies throughout the United States. *See Sholtis v. American Cyanamid Co.*, 238 N.J. Super. 8, 568 A.2d 1196 (App. Div. 1989) (rejecting market-share liability of asbestos manufacturers notwithstanding identification difficulties faced by plaintiffs); *Special Project: An Analysis of Legal, Social, and Political Issues Raised by Asbestos Litigation*, 36 Van. L. R. 573, 609-10 (1983); *The Fairness and Constitutionality of Statutes of Limitations for Toxic Torts*, 196 Harv. L. Rev. 168 (1983).

Rather than research the identity and location of any asbestos manufacturer that might have had a connection with New Jersey, plaintiff can make a simple inquiry of the Secretary of State. Defendants are then free to challenge by appropriate motion their amenability to jurisdiction. The statute, in a sense, shifts the initial burden of pleading personal jurisdiction to defendant.

The consequence of a defendant's failure to register is hardly draconian, and it bears a logical nexus to the statutory purpose: since defendant has made it marginally more difficult for plaintiff to identify and join it in a timely fashion, it is forced to defend the case on the merits. If significant time has elapsed since plaintiff's injury, plaintiff's burden of proof will be that much more difficult to sustain. Moreover, as noted by this Court in *G. D. Searle*, New Jersey law makes the equitable defense of laches available to defendants who can demonstrate that they have been predjudiced by plaintiff's delay in bringing suit. 455 U.S. at 411.

The lower court's conclusion that the burdens on interstate commerce are imposed by the tolling statute are "grossly disproportionate" to its putative benefits reduces the balancing test to little more than an opportunity for the courts to substitute their own judgment for that of the State Legislature. The New Jersey Legislature, to the lower court's obvious dismay, wanted to shift the odds slightly to plaintiffs' advantage. It treated the statute of limitations as something of a windfall and made it available only to those corporate defendants who had taken reasonable steps to notify plaintiffs of their whereabouts. That may not be the balance that the court would have struck as a legislative judgment, but there is nothing illegitimate or unconstitutional about it.

III.

THE LOWER COURT'S RETROACTIVE APPLICATION OF ITS HOLDING IS INCONSISTENT WITH THIS COURT'S RETROACTIVITY GUIDELINES.

The lower court's holding that its judgment must be given retroactive effect represents an inappropriate application of the standards laid out in *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971), and *Lemon v. Kurtzman*, 411 U.S. 192 (1973). While those cases declined to prescribe any rigid formula for deciding whether to give a ruling retroactive effect, they established as the guiding principles equity, foreseeability, and vindication of the constitutional policy behind the decision:

> First, the decision to be applied nonretroactively must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied, or by deciding an issue of first impression whose resolution was not clearly foreshadowed. Second, it has been stressed that "we must . . . weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation." Finally, we have weighed the inequity imposed by retroactive application, for "[w]here a decision of this Court could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the 'injustice or hardship' by a holding of nonretroactivity."

404 U.S. at 106-07, (citations omitted). *Accord, Lemon v. Kurtzman*, 411 U.S. at 198-99.

Application of those principles here should have resulted in the prospective invalidation of the New Jersey statute only, or at a minimum, a remand to the District Court.

The principle basis for the lower court's decision that its ruling should be given retroactive effect was its determination, without the benefit of any findings of fact by the District Court, that petitioners should have foreseen the constitutional infirmities of the statute, and therefore could not have reasonably relied upon the statute in failing to bring suit earlier. 900 F.2d at 693-94 (19a-20a). The court placed heavy reliance on the fact that the earlier version of the New Jersey tolling statute was the subject to several constitutional challenges from 1983 to 1986. However, nothing in *that* litigation suggested that there was any constitutional deficiency in the new statute enacted in 1984, the basis for tolling the statute of limitations in this case. The new law was drafted specifically to cure the constitutional defects cited in the earlier litigation. *See* Senate Judiciary Committee Statement to Senate Bill 953 (1984), N.J. Stat. Ann. 2A:14-22 at 123 (amendment "is intended to meet the Supreme Court's objections as stated in the *Coons* decision and thereby assist New Jersey citizens to pursue their claims against foreign corporations") (52a).

The court nonetheless held that "it was a foregone conclusion that there would be a constitutional attack on the amended tolling statute" and that its holding was "clearly foreshadowed." 900 F.2d at 694 (21a). The only evidence cited by the court in support of that conclusion is the fact that the earlier statute had been challenged, and that the New Jersey tolling rule was more expansive than the majority of state provisions. *Id.* at 694-96 (21a-25a). The court thus charged petitioner with greater prescience than that apparently possessed by the entire New Jersey Legislature, who expressly thought that they had fixed the problem.

In marked contrast to the court's conclusion that petitioner

should have known the statute was unconstitutional is the court's expansive concern for businesses that might have been deterred from appointing an agent for service of process by a *mistaken assumption* about the jurisdictional effect of appointment. Plaintiffs are charged with uncanny legal forecasting skills, while defendants are relieved of responsibility for knowing existing law.

Moreover, in contrast to the court's focus on the specifics on petitioners' individual claim, the court ignored entirely the reasonableness of respondent's own conduct. While finding an impermissible burden on commerce solely in the potential of some businesses to misconstrue the statute, the court did not even consider whether respondent's own failure to appoint an agent for service of process was out of concern for the jurisdictional effects of registration. The court thus ignored whether the policies supporting its ruling would be advanced by giving retroactive effect to the decision.

The constitutional interest implicated, if at all, by the New Jersey statute is in the elimination of excessive burdens on interstate commerce, not in insulating respondent from liability. Requiring respondent to defend the claim on the merits would, in no way, undermine that policy. As the Third Circuit stated in declining to give retroactive effect to an earlier statute of limitations ruling:

> Certainly, any inhibiting effect the statute might have had on foreign corporations and others contemplating doing business in New Jersey vanishes once the statute is invalidated, whether or not that invalidation is retroactive. Moreover, had there been no tolling statute, the probability is that the Cohns and most other plaintiffs similarly situated would have filed suit within the two-year statutory period. Although it is possible that prospective invalidation will permit maintenance

> of some suits that would not have been timely filed absent the tolling statute, we do not think that this slight marginal burden, if any, does violence to the Commerce Clause.

Cohn v. G.D. Searle & Co., 784 F.2d 460, 465 (3d Cir.), *cert. denied*, 479 U.S. 883 (1986).

Finally, considerations of equity cannot support the court's ruling. Had the ruling been given prospective effect only, all conceivable burdens on commerce would have been eliminated, and respondents could have still asserted the doctrine of laches or, in any event, could have defended the case on the merits. The retroactive application of the decision defeats not only petitioner's claim, but the claims of thousands of similarly situated asbestos victims, all of whom are precluded from relying on the statute. *See generally, Fischer v. Johns-Manville Corp.*, 103 N.J. 643, 512 A.2d 466 (1986) (noting that between eleven and thirteen million workers have been exposed to asbestos).

The New Jersey courts and legislature have struck a delicate balance in this area between liability assessing and liability insulating rules. The statute invalidated by the Court of Appeals was passed in the context of other rules, including the statute of limitations, that protect defendants and impose significant burdens on plaintiffs. Prospectively, New Jersey can assess whether to adjust that balance in light of the Court of Appeals decision. It cannot do so if the decision below is given retroactive effect. Respondent will be accorded a defense that the state may never have conferred under the circumstances. The retroactive application of the ruling is accordingly not only unfair to plaintiffs, but is an unnecessary usurpation of the state's regulatory prerogative.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit, should be granted.

Respectfully submitted,

JANE B. CANTOR
GARRUTO, GALEX & CANTOR
Attorneys for Petitioners

BRYAN D. GARRUTO
JANE B. CANTOR
Of Counsel

ALLAN STEIN, Camden, NJ
On the Petition

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Filed: April 10, 1990

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 89-5420

STEPHEN JUZWIN AND MARY JUZWIN, his wife

v.

ASBESTOS CORPORATION, LTD., individually and as successor to Johnson's Company; CAREY CANADIAN MINES; AMTORG TRADING CORPORATION; and METROPOLITAN LIFE INSURANCE COMPANY; FLINTKOTE MINES, LTD.; TURNER & NEWALL, P.L.C.; JOHN DOE CORPORATION (a fictitious name representing one or more corporations or companies, engaged in the business of mining, manufacturing, distributing or supplying finished and unfinished asbestos products and fibers to plaintiffs' employee GAF/Ruberoid); JUDY DOE CORPORATIONS (a fictitious name representing one or more legal entities who stand in the shoes of the John Doe defendants either as successor in interest, alter ego, or by other equitable doctrine which makes them responsible for the John Doe liability).

AMTORG TRADING CORP.,

Third-Party Plaintiff,

v.

Appendix A

LEONARD J. BUCK, INC., FLINTKOTE MINES, LTD., NATIONAL GYPSUM COMPANY and TURNER & NEWALL, P.L.C.,

Third-Party Defendants.

and

CAREY CANADA, INC.,

Defendant and Third-Party Plaintiff,

v.

LAC D'AMIANTE DU QUEBEC LIMITEE, individually and as successor to LAKE ASBESTOS OF QUEBEC, LTD. and BELL ASBESTOS MINES LIMITED,

and

LEONARD J. BUCK, INC.

Third-Party Defendant and Fourth Party Plaintiff.

v.

ASSOCIATED ORE & METAL CORP., LTD.

Fourth-Party Defendant,

CAREY CANADA, INC.,

Appellant.

Appendix A

Appeal from the United States District Court
for the District of New Jersey (Newark)
(D.C. Civil No. 87-3876)

Argued October 16, 1989

BEFORE: BECKER, COWEN and SEITZ,
Circuit Judges.

(Filed: April 10, 1990)

Andrew T. Berry, Esquire (Argued)
Kevin J. Connell, Esquire
Stephen Marinko, Esquire
McCarter & English
Four Gateway Center
100 Mulberry Street
Newark, New Jersey 07102
Attorneys for Appellant

Jane B. Cantor, Esquire (Argued)
Frances A. Tomes, Esquire
Garruto, Galex & Cantor, P.C.
180 Tices Lane
East Brunswick, New Jersey 08816

Peter N. Perretti, Jr.,
Attorney General of New Jersey
Mary C. Jacobson, Esquire
Harry Haushalter, Esquire (Argued)
R.J. Hughes Justice Complex, CN 112
Trenton, New Jersey 08625

Appendix A

Arthur D. Bromberg, Esquire (Argued)
Budd Larner Gross Picillo Rosenbaum
Greenberg & Sade, P.C.
150 John F. Kennedy Parkway
Short Hills, New Jersey 07078

David M. Katzenstein, Esquire
Goldfein & Joseph, P.C.
330 Alexander Street, Suite 201
Princeton, New Jersey 08540

Richard V. Jones, Esquire
Bressler, Amery & Ross
P.O. Box 1980
Morristown, New Jersey 07960

H. Frank Carpenter, Esquire
Carton, Nary, Witt & Arvanitis
P.O. Box 1229
Asbury Park, New Jersey 07712

Leon B. Piechta, Esquire
O'Donnell, Kennedy, Vespole & Piechta
414 Eagle Rock Avenue
West Orange, New Jersey 07052
Attorney for Appellees

Alan M. Darnell, Esquire
Wilentz, Goldman & Spitzer
90 Woodbridge Center Drive
P.O. Box 10
Woodbridge, New Jersey 07095
Attorney for Amicus Curiae

Appendix A

OPINION OF THE COURT

SEITZ, *Circuit Judge.*

Carey Canada, Inc., (defendant) appeals from an interlocutory order of the district court denying its motion for summary judgment based on the New Jersey statute of limitations. The district court concluded that N.J. Stat. Ann. § 2A:14-22 (West 1987) (the "tolling statute") is constitutional. Therefore, defendant's failure to designate a representative to accept service of process pursuant to that statute tolled the statute of limitations. The district court certified the order under 28 U.S.C. § 1292(b) (1982). Since that order involves a controlling question of law as to the constitutionality of the tolling statute, we granted permission to appeal.

I.

Stephen and Mary Juzwin (plaintiffs) brought suit in the Superior Court of New Jersey, alleging that Stephen's asbestos-related ailments were caused by exposure to asbestos fibers supplied by defendant and others. Upon application of defendant Amtorg Trading Corporation, the action was removed to the United States District Court for the District of New Jersey.

Plaintiffs admit that this cause of action arose in 1982 when Stephen Juzwin was diagnosed as having asbestosis and concede that they did not institute legal proceedings within the New Jersey two-year statute of limitations period. *Juzwin v. Amtorg Trading Corp.*, No. 87-3876, slip op. at 4 (D.N.J. filed February 28, 1989). Thus, plaintiffs' action is barred unless, as the district court concluded, that statute of limitations was tolled pursuant to New Jersey's tolling statute. *Id.* at 14.

Appendix A

New Jersey's tolling statute provides in pertinent part:

> If any person against whom there is any of the causes of action specified in sections 2A:14-1 to 2A:14-5 and 2A:14-8 . . . is not a resident of this State when such cause of action accrues . . . or if any corporation or corporate surety not organized under the laws of this State, against whom there is such a cause of action, is not represented in this State by any person or officer upon whom summons or other original process may be served, when such cause of action accrues . . . the time or times during which such person or surety is not residing within this State or such corporation or corporate surety is not so represented within this State shall not be computed as part of the periods of time within which such action is required to be commenced by the section. The person entitled to any such action may commence the same after the accrual of the cause therefor, within the period of time limited therefor by said section, exclusive of such time or times of nonresidence or nonrepresentation.
>
> A corporation shall be deemed represented for purposes of this section if the corporation has filed with the Secretary of State a notice designating a representative to accept service of process.

N.J. Stat. Ann. § 2A:14-22 (West 1987).[1]

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1. New Jersey's present tolling statute was adopted in 1984, replacing a (Cont'd)

Appendix A

Defendant, a corporaton formed under the laws of Canada, has no corporate offices in the state of New Jersey, has never been registered to do business there, and has not appointed an agent for service of process with the Secretary of State. Thus, it is not "represented" in New Jersey within the meaning of the tolling statute. It appears to concede, however, that it was properly served under New Jersey's long-arm court rule, N.J. Ct. R. 4:4-4(c)(1).

Citing *Bendix Autolite Corp. v. Midwesco Enters., Inc.*, 486 U.S. 888 (1988), defendant moved for summary judgment on the ground that the tolling statute violates the commerce clause. In *Bendix,* the Supreme Court invalidated an Ohio tolling statute which required a foreign corporation to subject itself to the general jurisdiction of the Ohio courts, "whether or not the transaction in question had any connection with Ohio," in order to gain the protection of its statute of limitations. *Bendix*, 486 U.S. at 892.

The district court concluded that, unlike the Ohio statutory scheme, the New Jersey tolling statute does not compel the conclusion that designation of an agent for service of process subjects a foreign corporation to the general jurisdiction of the New Jersey courts. The court noted that the Secretary of State's practice of accepting designations of a representative for service of process only for causes of action having a nexus with New

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(Cont'd)

statute found unconstitutional in *Coons v. American Honda Motor Co.*, 463 A.2d 921 (N.J. 1983) (*Coons I), on rehearing*, 476 A.2d 763 (N.J. 1984) (*Coons II), cert. denied*. 469 U.S. 1123 (1985). The New Jersey Supreme Court held that requiring a foreign corporation to obtain a "certificate of authority" to do business in New Jersey in order to achieve "representation" and gain the benefits of the statute of limitations unconstitutionally burdened interstate commerce. *Id.* at 927.

Jersey. Such a limited designation, the court held, imposed no unconstitutional burden on interstate commerce.

II.

As we read *Bendix*, the New Jersey tolling statute would be invalid if it were applied to all foreign corporations, regardless of their connection with New Jersey. However, we will assume without deciding that the New Jersey Supreme Court would interpret the statute to permit designation of an agent for service of process only for causes of action having a nexus with New Jersey. The issue then becomes whether the statute so interpreted still constitutes an impermissible burden on interstate commerce. Our standard of review is plenary.

It may be helpful at the outset if we review the three standards of review that are applied in performing a dormant commerce clause inquiry:

> 1) state actions that purposefully or arbitrarily discriminate against interstate commerce or undermine uniformity in areas of particular federal importance are given heightened scrutiny; 2) legislation in areas of peculiarly strong state interest is subject to very deferential review; and 3) the remaining cases are governed by a balancing rule, under which state law is invalid only if the incidental burden on interstate commmerce is clearly excessive in relation to the putative local benefits.

Ford Motor Co. v. Insurance Comm'r of Pa., 874 F.2d 926, 941 (3d Cir. 1989), *cert. denied sub nom. United Services Auto.*

Ass'n v. Foster, 110 S.Ct. 418 (1989) (citing *Norfolk Southern Corp., v. Oberly,* 822 F.2d 388, 398-99 (3d Cir. 1987)).[2]

While heightened scrutiny is the standard of review for simple economic protectionism, "[this] category of protectionism includes those state measures that discriminate on their face against out-of-state interests or in favor of in-state interests." *Norfolk Southern Corp.,* 822 F.2d at 400 (citations omitted). Because the New Jersey tolling statute applies to out-of-state corporations but not to New Jersey corporations,[3] it comes within the class of statutes that are subject to heightened scrutiny. *See Old Coach Dev. Corp. v. Tanzman,* 881 F.2d 1227, 1231 (3d Cir. 1989) (citations omitted).

To pass the heightened scrutiny test, the state is required to "demonstrate both that the statute 'serves a legitimate local purpose,' and that this purpose could not be served as well by available nondiscriminatory means." *Id. (*quoting *Maine v. Taylor,* 477 U.S. 131, 138 (1986) (quoting *Hughes v. Oklahoma,* 441 U.S. 322, 336 (1979)). "In practice, such heightened scrutiny is applied with considerable rigor and turns out to be 'a virtually *per se* rule of invalidity.' " *Norfolk Southern Corp.,* 822 F.2d at 400 (quoting *Philadelphia v. New Jersey,* 437 U.S. 617, 624 (1978)).

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2. None of the parties argue that the correct standard to be applied to the New Jersey tolling statute is that of deferential review. New Jersey has, of course, legitimate interest in facilitating the claims of its citizens, but we are not here concerned with a "peculiarly strong" state interest, such as public health or safety. These are the areas that most commonly invoke the deferential standard.

3. The critical words are "any corporation or corporate surety not organized under the laws of this State." N.J. Stat. Ann. § 2A:14-22 (West 1987).

Appendix A

As the district court recognized, New Jersey has a legitimate interest in "assist[ing] New Jersey citizens to pursue their claims against foreign corporations." New Jersey Senate Judiciary Committee's Statement to Senate Bill 953 (1984), dated February 23, 1984. The tolling statute is designed to further that interest by suspending "the running of the statute of limitations for foreign corporations that are not represented in New Jersey and thus cannot be reached with service of process." *Id.*

However, "[t]he purpose of the statute is not confined to providing relief when service is impossible. Even where absent residents could be served outside the State, the statute still provides for tolling." *Velmohos v. Maren Eng'g Corp.*, 416 A.2d 372, 380 (N.J. 1980), *vacated*, 455 U.S. 985 (1982). We think New Jersey's legitimate interest could adequately be protected by a statute that permits a court to order the statute of limitations to be tolled when it is satisfied that, in spite of diligent efforts, long-arm service cannot be effectuated either because the corporation is beyond the reach of the long-arm rule or because it cannot be found for mail service. *See Bendix*, 486 U.S. at 898 (Scalia, J., concurring). Indeed, there is a somewhat related procedure in New Jersey with respect to unknown defendants.[4]

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4. New Jersey court rules permit plaintiffs to file complaints against "John Doe" defendants. N.J. Ct. R. 4:26-4 provides in pertinent part:

> [I]f the defendant's true name is unknown to the plaintiff, process may issue against the defendant under a fictitious name, stating it to be fictitious and adding an appropriate description sufficient to identify him.

"[T]he complaint may be amended after the statute of limitations has run to substitute the defendant's true name and effect service on him, particularly

(Cont'd)

While a narrowly tailored statute would still differentiate between in-state and out-of-state defendants, the differentiation would be based on the inability to locate or reach, not on the attribute of being foreign. "[W]hatever [a state's] ultimate purpose, it may not be accomplished by discriminating against articles of commerce coming from outside the State unless there is some reason, apart from their origin, to treat them differently." *Philadelphia v. New Jersey*, 437 U.S. 617, 626-27 (1978) (emphasis added).

Thus, we hold that the New Jersey tolling statute is invalid under heightened scrutiny[5] because New Jersey has offered no reason why the state's legitimate purpose could not be served as

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(Cont'd)

where the defendant can show neither prejudice resulting from nor reliance upon the lapse of time." Pressler, Current N.J. Court Rules, Comment R. 4:26-4 at 905 (1989) (citing *Farrell v. Votator Div. of Chemetron Corp.*, 299 A.2d 394 (1973).

However, the New Jersey fictitious defendant rule is not available to a plaintiff in federal court since it is a procedural device, not a rule of substantive law. Fed. R. Civ. P. 15(c), the analogous federal rule, does not permit the amendment to relate back.

5. Compare *Abramson v. Brownstein*, 897 F.2d 389, ____ (9th Cir. 1990), where the Ninth Circuit recently applied the balancing test to the California tolling statute since "[o]n its face, California's tolling statute is nondiscriminatory because it treats alike residents and nonresidents of California." The court declared the statute unconstitutional under the commerce clause because, "[l]ike the defendant in *Bendix*, the California long arm statute would have permitted service on Brownstein throughout the limitations period." *Id.* at ____ .

well by the adoption of a more narrowly drawn statute.[6] *See Old Coach Dev. Corp.*, 881 F.2d at 1234.

In spite of our holding, we are constrained, as was the Supreme Court in *Brown-Forman Distillers v. New York Liquor Auth.*, 476 U.S. 573, 579 (1986), to recognize how difficult it is to draw the line between a statute that is virtually *per se* invalid and one that must be analyzed under the balancing test enunciated in *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970).

Plaintiffs argue that *Bendix* mandates use of the less rigorous *Pike* balancing test. We disagree. The *Bendix* court said:

> The Ohio statute before us *might* have been held to be a discrimination that invalidates without extended inquiry. We *choose*, however, to assess the interests of the State, to demonstrate that its legitimate sphere of regulation is not much advanced by the statute while interstate commerce is subject to substantial restraints.

Bendix, 486 U.S. at 891 (emphasis added). We read this passage to mean that either approach is permissible. As in *Bendix*, however, the selection of the test in this case is not outcome-determinative, for even under the balancing test, the statute cannot survive.

Under the *Pike* test, if the state interest being advanced by

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6. Since we hold that the statute is invalid under the commerce clause because it impermissibly burdens interstate commerce, we do not reach defendant's argument that it should be struck down as a burden on foreign commerce.

the statute outweighs the burden imposed on interstate commerce, then the statute is valid, unless some less onerous means could be adopted by the state that would accomplish its purpose. *Pike*, 397 U.S. at 142.

While the state has articulated a legitimate interest in assisting its citizens to pursue their claims against foreign corporations, New Jersey's long-arm rule provides a relatively simple means of promptly effecting service of process on most foreign corporations. It is true that long-arm service is procedurally more demanding for a plaintiff then service on a New Jersey agent. However, once a plaintiff has determined "after diligent inquiry" that personal service cannot be made in New Jersey and that out-of-state service is "consistent with due process of law," then service may be effectuated, at less expense than personal service, by registered or certified mail directed to the corporation's principle place of business. N.J. Ct. R. 4:4-4(c)(1). This method does not seem unduly burdensome for the party initiating the action.

Plaintiffs argue that in order to use the long-arm rule, one must first locate the defendant. As we indicated in the foregoing discussion, a more narrowly drawn tolling statute would still assist New Jersey citizens to pursue claims against foreign defendants who cannot be found by tolling the statute of limitations, thereby eliminating that possible defense.

Opposite the putative local benefit of the tolling statute we must place the burden on interstate commerce. Since the New Jersey statute does not on its face indicate whether designation of an agent for service of process subjects a corporation to general or limited jurisdiction, it is impossible for a foreign corporation to discern from the statute's wording what the consequences of designating an agent will be. Thus, prudence dictates that foreign

corporations wishing to avail themselves of New Jersey's statute of limitations must inquire as to the consequences of designation under the statute. Moreover, given the wording of the tolling statute, foreign corporations may be understandably reluctant to rely on an informal practice of an administrative or executive body to protect themselves from exposure to the general jurisdiction of New Jersey.

We disagree with the district court's conclusion that the burdens on interstate commerce are no more than the need to determine the consequences of designating an agent and the act of designating such an agent. The real burden is that foreign corporations unrepresented but possibly amenable to long-arm service must make the difficult choice whether to file designations (with uncertain consequences) or forego a potential limitations defense, a burden that neither New Jersey corporations nor foreign corporations registered to do business in New Jersey bear.[7]

The magnitude of such a burden on many nonresident corporations is grossly disproportionate to the state's interest in assisting resident plaintiffs in the pursuit of claims against foreign corporations.

Thus, even with a limiting construction, N.J. Stat. Ann. § 2A:14-22 violates the commerce clause under either test since

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7. The origins of the New Jersey tolling statute date back to 1820. *Velmohos v. Maren Eng'g Corp.*, 416 A.2d 372, 376 (N.J. 1980), *vacated*, 455 U.S. 985 (1982). In the original version, there was no specific reference to corporations. *Id.* The tolling statute remained largely unchanged until 1949, when the legislature amended it to provide an exemption for domestic corporations and those foreign corporations maintaining representatives in New Jersey, thereby extending to them the benefits of the state's statutes of limitations. *Id.* at 377.

a nondiscriminatory procedure, less budensome to interstate commerce, could be adopted by New Jersey.

III.

The parties urge that, if we find the New Jersey statute unconstitutional, we should then go on to decide whether our ruling applies retroactively. Although the retroactivity issue was not part of the question certified under section 1292(b), we recognize that our review is of orders and not of isolated legal questions. *Miller v. Bolger,* 802 F.2d 660, 666 (3d Cir. 1986). "It follows that we are free to consider all grounds advanced in support of the grant of summary judgment and all grounds suggested for sustaining its denial." *Id.* (citations omitted). Thus, we turn now to consideration of the retroactivity issue.

Plaintiffs argue that we are obliged to follow the lead of the New Jersey Supreme Court which previously held in *Coons II* that the unconstitutionality of the prior tolling statute would be prospectively applied.

Plaintiffs are mistaken. As we said in *Cohn v. G.D. Searle & Co.,* 784 F.2d 460 (3d Cir.), *cert. denied,* 479 U.S. 883 (1986), "Where a state statute is held to violate the federal Constitution, the retroactivity *vel non* of that holding is similarly a matter of federal law which we must determine independently." *Id.* at 463 (citations omitted).

As the Supreme Court has noted, "The process of reconciling the constitutional interests reflected in a new rule of law with reliance interests founded upon the old is 'among the most difficult of those which have engaged the attention of courts, state and federal . . . '" *Lemon v. Kurtzman,* 411 U.S. 192, 198 (1973)

(*Lemon II*) (quoting *Chocot County Drainage Dist. v. Baxter State Bank,* 308 U.S. 371, 374 (1940)). It is not surprising, then, that modern jurisprudence recognizes no set principle of retroactivity.[8] Instead, modern decisions reflect a balancing approach which recognizes that "statutory or even judge-made rules of law are hard facts on which people must rely in making decisions and in shaping their conduct." *Id.* at 199. Justice Harlan aptly called this approach the "ambulatory retroactivity doctrine." *Mackey v. United States,* 401 U.S. 667, 681 (1971) (Harlan, J., concurring).

In *Chevron Oil Co., v. Huson,* 404 U.S. 97 (1971), the Supreme Court stated a three-factor test for determining whether a new rule of law is to be applied retroactively:

> First, the decision to be applied nonretroactively must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied, or by deciding an issue of first impression whose resolution was not clearly foreshadowed. Second, it has been stressed that "we must . . . weigh the merits and demerits in each case by looking to the prior history of the

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8. Thus, a decision may be applied retroactively, nonretroactively or even prospectively. "Retroactive" describes judgments applicable in all cases, regardless of when the cause of action arose or the case was litigated. "Nonretroactive" judgments are those that apply the "new" law to the parties before the court and future cases, but not previous or pending cases. "Prospective" judgments govern only future cases, reaching neither the parties before the court nor any previous or pending cases. *Cohn,* 784 F.2d at 462 n.5 (citing *Marino v. Bowers,* 657 F.2d 1363, 1375 n.4 (3d Cir. 1981) (Weis, J., dissenting). *See Generally* Beytagh, *Ten Years of Non-Retroactivity; A Critique and a Proposal.* 61 Va.L.Rev. 1557 (1975); R. Aldisert. *The Judicial Process* 877-938 (1976).

> rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation." Finally, we have weighed the inequity imposed by retroactive application, for "[w]here a decision of this Court could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the 'injustice or hardship' by a holding of nonretroactivity."

404 U.S. at 106-07 (citations omitted).[9]

The application of the *Chevron* factors is particularly difficult where, as here, we are determining the appropriate scope of federal equitable remedies regarding the enforcement of a state statute during the period before it was declared unconstitutional. *Lemon II*, 411 U.S. at 199. Our task in such cases is to shape the remedy as a blend of what is necessary, what is fair, and what is workable. *Id.* at 200.

Because of the continuing presumption in favor of retroactivity, we can refuse to give the rule retroactive effect only where on balance the weight of the three *Chevron* factors favors prospective application. *See, e.g., Al-Khazrahji v. Saint Francis*

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9. We have applied these criteria in a number of cases where the statute of limitations was at issue. *See, e.g., Hill v. Equitable Trust Co.*, 851 F.2d 691 (3d Cir. 1988), *cert. denied sub nom. Data Controls North, Inc., v. Equitable Bank Nat'l Assoc.*, 109 S.Ct. 791 (1989); *Al-Khazraji v. Saint Francis College*, 784 F.2d 505 (3d Cir. 1986), *aff'd*, 481 U.S. 604 (1987); *Goodman v. Lukens Steel Co.*, 777 F.2d 113 (3d Cir. 1985); *aff'd*, 482 U.S. 656 (1987); *Fitzgerald v. Larson*, 769 F.2d 160 (3d Cir. 1985); *Smith v. City of Pittsburgh*, 764 F.2d 188 (3d Cir.), *cert. denied*, 474 U.S. 950 (1985).

College, 784 F.2d 505, 514 (3d Cir. 1986), *aff'd,* 481 U.S. 604 (1987) (where two of the three *Chevron* factors were present and the third was neutral, decision would be prospectively applied). But, *cf. Smith v. City of Pittsburgh,* 764 F.2d 188, 197 (3d Cir. 1985) (where first factor favored retroactive application and other two factors did not militate against it, decision would be retroactively applied). The party seeking to avoid retroactive application bears the burden of persuasion. *Ackinclose v. Palm Beach County, Fla.,* 845 F.2d 931, 933 (11th Cir. 1988) (citation omitted). *Accord Zemonick v. Consolidation Coal Co.,* 762 F.2d 381, 391 (4th Cir. 1985) (Ervin, J., dissenting), *rev'd on rehearing,* 796 F.2d 1546, *cert. denied,* 479 U.S. 1018 (1986).

Turning then to the first factor, we must ask whether our decision overrules clear past precedent on which the parties may have relied or decides an issue of first impression whose resolution was not clearly foreshadowed. This requires us to examine the state of the law from the time plaintiffs' cause of action arose until they filed their complaint.

Plaintiffs admit that Stephen Juzwin's asbestosis was diagnosed on August 16, 1982, and concede that, in filing their complaint on July 24, 1987, they did not institute suit within the applicable two-year statute of limitations. *Juzwin v. Amtorg Trading Corp.*, No. 87-3876, slip op. at 4 (D.N.J. filed February 28, 1989). The critical period therefore is between August 16, 1982, and July 24, 1987.

The first hint of a commerce clause problem with the New Jersey tolling statute came early in 1982 with the Supreme Court's decision in *G.D. Searle & Co. v. Cohn,* 455 U.S. 404 (1982). The Court, while affirming this court's holding that the statute did not violate the equal protection and due process clauses, vacated

the judgment and remanded for consideration of the commerce clause. Thus, when plaintiffs' cause of action accrued, the tolling statute had been attacked but not struck down.

While *Cohn* was pending on remand in the district court, the New Jersey Supreme Court declared the statute unconstitutional under the commerce clause in mid-1983 and held that its decision was to be applied retroactively.*Coons v. American Honda Motor Co.*, 463 A.2d 921 (N.J. 1983) (*Coons I*), *on rehearing*, 476 A.2d 763 (N.J. 1984) (*Coons II*), *cert. denied*, 469 U.S. 1123 (1985). At this point in time, plaintiffs had lost the protection of any tolling statute, with one year of the two-year limitations period remaining. Nevertheless, they did not file their complaint. In June 1984, just two months before plaintiffs' cause of action would have expired under the two-year statute of limitations, the New Jersey Supreme Court on rehearing held that its decision in *Coons I* was to be applied prospectively. *Coons v. American Honda Motor Co.*, 476 A.2d 763 (N.J. 1984) (*Coons II*), *cert. denied*, 469 U.S. 1123 (1985). The court further stated that the statute of limitations as to foreign, unrepresented corporations would commence to run as of August 3, 1983, the date of *Coons I*. *Id.* at 773. Plaintiffs now had an additional year within which to file suit, yet they did not do so.

In August of 1984, the New Jersey legislature amended the tolling statute in an effort to correct the constitutional infirmity. Plaintiffs once again had a tolling statute to rely on since a duly enacted state or federal law is presumptively valid under the Constitution. *See Cohn*, 784 F.2d at 464.

However, in December of 1984, the district court, while agreeing with the New Jersey Supreme Court that the pre-1984 tolling statute violated the commerce clause, stated that it was

not bound by *Coons II,* since federal, not state, law governs the issue of retroactivity, and held that its decision was to be applied retroactively. *Cohn v. G.D. Searle & Co.,* 598 F.Supp. 965, 969 (D.N.J. 1984), *vacated,* 784 F.2d 460 (3d Cir.), *cert. denied,* 479 U.S. 883 (1986). Once again, plaintiffs' cause of action was in jeopardy since the initial two-year limitations period had expired earlier that year, and it was not clear whether the *Coons II* limitations period was available to them. But, plaintiffs made no apparent effort to file their complaint.

This court reversed the district court in 1986, holding that the decision was to be applied prospectively only. *Cohn,* 784 F.2d at 465. Plaintiffs' claim was revived once more. Still, plaintiffs delayed, allowing an additional year and a half to pass before filing.

Plaintiffs in this case are quite unlike the plaintiffs in *Cohn* (brought suit in state court in 1974 and defendant removed to federal court) and *Coons* (initiated suit in state court in 1978), who relied on a statute with origins dating back to 1820 that had remained unchanged for some 25 years, that had withstood constitutional attack more than 10 years earlier, and that had never been attacked on commerce clause grounds. Here, to the contrary, there was no clear precedent governing the earlier tolling statute upon which plaintiffs might have relied. A commerce clause issue had been raised and remained unresolved at the time their cause of action accrued.

This court has held that when a definitive ruling on the appropriate limitations period was lacking at the time plaintiffs delayed bringing suit, plaintiffs in such cases could not justify the delay. *See Goodman v. Lukens Steel Co.,*777 F.2d 113 (3d Cir. 1985), *aff'd* 482 U.S. 656 (1987); *Fitzgerald v. Larson,* 769

F.2d 160 (3d Cir. 1985); and *Smith v. City of Pittsburgh,* 764 F.2d 188 (3d Cir.), *cert. denied.* 474 U.S. 950 (1985), where we refused to apply the decision in *Wilson v. Garcia,* 471 U.S. 261 (1985), prospectively. *Cf. Al-Khazraji v. Saint Francis College,* 784 F.2d 505 (3d Cir. 1986) *aff'd,* 481 U.S. 604 (1987) (there was clear precedent upon which plaintiff had the right to rely).

Indeed, there was no precedent at all interpreting the new tolling statute on which plaintiffs here ultimately relied. Furthermore, it was a foregone conclusion that there would be a constitutional attack on the amended tolling statute. The question, then, becomes whether our decision in this case was clearly foreshadowed.

The practice that our decision finds impermissible under the commerce clause is tolling the statute of limitations against foreign corporations unrepresented in New Jersey, regardless of whether or not they may be served under the New Jersey long-arm court rule. As early as 1963, nonresident defendants had challenged the New Jersey tolling statute, arguing that its "representation" requirement ought to be interpreted to mean "amenability to service." *See Lemke v. Bailey,* 196 A.2d 523 (N.J. 1963) (statute not unconstitutional on theory it denied equal protection, even though individual nonresident motorist defendants were subject to service of process via Director of Motor Vehicles).

A similar argument was made in terms of New Jersey's long arm court rule and rejected in *Velmohos v. Maren Eng'g Corp.,* 416 A.2d 372 (N.J. 1980), *vacated,* 455 U.S. 985 (1982), where the court held that procedural difficulties in effecting long-arm service supplied a rational basis for different treatment of those amenable to service in New Jersey and those that could only be served outside the jurisdiction. However, it was clear, even then,

that New Jersey's interpretation of its tolling statute placed it with a minority of jurisdictions. As this court noted in *Hopkins v. Kelsey-Hayes, Inc.*, 628 F.2d 801, 807 n.11 (3d Cir. 1980), *vacated sub nom. G.D. Searle & Co., v. Cohn*, 455 U.S. 404 (1982), many other state courts have construed their tolling provisions differently so that out-of-state defendants amenable to long-arm jurisdiction are exempt from the tolling of the statute of limitations.[10] The *Velmohos* court distinguished the New Jersey tolling statute on the basis that the statutes of other states were phrased in terms of "absence" not "representation."

While *Velmohos* resolved the statutory issue regarding the correct interpretation of "representation," it did not resolve the constitutional question which resurfaced in the commerce clause context in a pair of cases, one working its way through the state court system (*Coons*) and one through the federal court system (*Cohn*). The New Jersey Supreme Court struck down the tolling statute in *Coons I* on the grounds that requiring a foreign corporation to obtain a certificate to do business in New Jersey in order to achieve "representation" in the context of the tolling statute constituted an impermissible burden on interstate commerce. It had no need to address the issue of whether requiring a foreign corporation to be served within the jurisdiction to obtain the benefit of the state's limitations statutes violated the commerce clause. Thus, when the New Jersey legislature amended the statute to correct the problem of "how" to achieve "representation," it did not consider the issue of "amenability to service."

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10. *See generally* Annotation, *Tolling of Statute of Limitations During Absence from State as Affected by Fact that Party Claiming Benefit of Limitations Remained Subject to Service During Absence or Nonresidence*, 55 A.L.R.3d 1158 (1974).

Appendix A

When we rejected the equal protection and due process challenges to New Jersey's tolling statute, we were careful to recognize that it was only necessary for the statute to be rationally related to a legitimate government purpose since this constitutional minimum is all that is required for equal protection and due process purposes. *Hopkins,* 628 F.2d at 811. It is well understood, however, that distinctions that suffice for equal protection purposes may be insufficient to withstand commerce clause analysis. *See Bendix,* 486 U.S. at 894. Given the protracted litigation occasioned by this statute, the more than 25-year preoccupation with the issue of "amenability to service" and our carefully worded holding in *Hopkins,* we do not think that our decision here can be termed "superseding legal doctrine that was quite unforeseeable." *See Chevron,* 404 U.S. at 108. Nor are we persuaded that our decision signals an abrupt change in clearly established law, as was the case in *Coons* and *Cohn. Chevron's* first factor, therefore, favors retroactive application.

The second factor under *Chevron* requires us to "weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation." 404 U.S. at 106-07. There has been some confusion in the case law as to the term "rule," with some courts interpreting it to mean the underlying constitutional principle and others, the particular decision of the court. Thus, in *Cohn,* the district court focused on the purpose of the commerce clause, "to free interstate commerce from the burdens which might be imposed by the individual states." *Cohn,* 598 F.Supp. at 971. We assumed for the purposes of our argument that the district court had characterized the purpose of the rule correctly. *Cohn,* 784 F.2d at 465. However, we think the better interpretation of the term "rule" is that it refers to the ruling of the court and that the

underlying constitutional principle is the "fulcrum" of the ruling. *See Lemon II,* 411 U.S. at 201.

The purpose of our ruling, then, is to prevent New Jersey from discriminating against out-of-state corporations solely on the basis that they cannot be served within the state. The ruling recognizes the principle that "[o]ne who by law is subject to a state's jurisdiction is effectively present and represented within the state." *Cohn,* 447 F.Supp. at 912 (citations omitted). The effect of our ruling is to ensure that, like New Jersey corporations, foreign corporations that at all times are amenable to service of process under the long-arm rule have the benefit of the state's statutes of limitations. Implementation of our decision will bring New Jersey law into conformity with the rule in the majority of states, that amenability to process by long-arm service renders a tolling statute inapplicable. To give our ruling only prospective effect would retard the purpose of the rule by allowing an entire class of plaintiffs to pursue claims against foreign corporations that the statute of limitations would bar against New Jersey corporations. Thus, we conclude that the second factor favors retroactivity as well.

The final *Chevron* factor involves a balancing of the equities of retroactive application so as to avoid harsh, unjust or inequitable results. "It is well established that reliance interests weigh heavily in the shaping of an appropriate equitable remedy." *Lemon II,* 411 U.S. at 203 (citations omitted). We have recognized that, in practice, this consideration overlaps with the first factor so that if plaintiffs could have reasonably relied on the tolling statute, it would be inequitable to give retroactive application to a shorter limitations period. *Fitzgerald,* 769 F.2d at 164.

However, in this case, given the precarious constitutional

status of the New Jersey tolling statute, we do not find that plaintiffs' reliance was reasonable. Furthermore, plaintiffs offer no explanation for why they delayed filing during this period of uncertainty. It must be remembered that plaintiffs bear the burden of proof on each factor, and it is not enough merely to argue "unfair!" We are mindful that application of our decision to plaintiffs will deny them the opportunity of obtaining a decision on the merits of their case, but we find that the law was not sufficiently clear for them to have delayed filing.

On the other side of the equation, we find that it would be inequitable to continue to apply a different limitations period out-of-state corporations merely because they could not be served within the state of New Jersey. Defendants raise an additional argument, which we find relevant here, namely, the hardship to third-party defendants if we apply our decision prospectively. The right of a defendant to seek contribution from a joint tortfeasor under N.J. Stat. Ann. § 2A:53A-1, *et seq.* (West 1987), is not affected by the running of the limitations period. Thus, even New Jersey corporations and foreign corporations who have complied with the provisions of the tolling statute would continue to be deprived of the protection of the statute of limitations when they were joint tortfeasors with a nonrepresented foreign corporation.

Where on balance the equities favor retroactive application of our decision, we ought to follow the normal rule that the benefits of a new legal principle should go to the litigant but for whom the issue would not have come to the court's attention. *Cohn,* 784 F.2d at 466. "It is fundamental to our jurisprudence that change in the law, at least in the courts, comes only through the efforts of individual litigants, motivated not by an academic concern for doctrinal correctness but by simple self-interest." *Id.* (citition omitted).

Appendix A

After due consideration of the three *Chevron* factors as applied to the facts of this case, we conclude that our decision invalidating the New Jersey tolling statute on commerce clause grounds should be applied retroactively. Plaintiffs have not established that their reliance on the new tolling statute was reasonable in light of the uncertain state of the law. Thus, application of our decision to their claim would not be inequitable or harsh. Finally, retroactive application will further the purposes underlying our decision.

Accordingly, the order of the district court filed on February 28, 1989, upholding the constitutionality of the New Jersey tolling statute, N.J. Stat. Ann. 2A:14-22, and denying summary judgment, will be reversed with a direction to enter judgment for Carey Canada.

A True Copy:
Teste:

Clerk of the United States Court of Appeals for the Third Circuit

APPENDIX B — OPINION OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY FILED FEBRUARY 28, 1989

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Civil No. 87-3876

STEPHEN JUZWIN and MARY JUZWIN, his spouse,
Plaintiffs,

v.

AMTORG TRADING CORP., et al.,
Defendants.

and

AMTORG TRADING CORP.,
Defendant-Third
Party Plaintiff,

v.

LEONARD J. BUCK, INC., FLINTKOTE MINES, LTD., NATIONAL GYPSUM COMPANY and TURNER & NEWALL, PLC.,
Third Party
Defendants.

OPINION

SAROKIN, District Judge.

Appendix B

In this asbestos-related products liability action, a host of motions are before the court.

First, the Attorney General for the state of New Jersey moves to intervene in this action for the purpose of defending the constitutionality of the New Jersey tolling statute.

Second, defendants move for summary judgment, arguing that plaintiff's action was not brought within the applicable time period of the statute of limitations and that the statute was not tolled because the New Jersey tolling statute is unconstitutional.

Third, defendant Amtorg Trading Co. moves for summary judgment against plaintiff on the grounds that plaintiff has not sufficiently shown a nexus between Amtorg Trading and plaintiff's injuries, or in the alternative, an order precluding certain evidence as irrelevent.

Fourth, plaintiff moves that the court deem defendant Asbestos Corporation Ltd. ("ACL") to be the successor to Johnson's company and liable for the manufacture and sale of asbestos by Johnson's Company as a sanction for ACL's refusal to answer plaintiff's requests for admissions during discovery on the basis of the Quebec Business Concerns Records Act ("QBCRA"). In a related motion, ACL requests a protective order based on its inability to comply with plaintiff's requests.

Fifth, plaintiff moves that the defendants be precluded from offering evidence of the employer's knowledge of and conduct regarding the health hazards of asbestos.

Sixth, plaintiff moves that the defense of contributory

negligence (and evidence introduced in support of the defense) be barred from this strict liability action.

Seventh, plaintiff requests the entry of an order holding that defendants' asbestos fiber was defective as a matter of law in that it did not contain a warning.

Eighth, plaintiff requests that the court hold that Leonard J. Buck Co. and Amtorg Trading Corp. can be held strictly liable in tort as the distributors of asbestos fiber, and defendant Amtorg Trading Corp. requests that the court hold that it cannot be held strictly liable for its activities as a broker of asbestos.

Ninth, defendants argue that absent expert testimony that a reasonable medical probability exists that a plaintiff will develop cancer due to exposure to asbestos, all testimony and evidence relating to increased risk of cancer should be barred by the court, and that plaintiff should be precluded from recovering for fear of cancer absent expert testimony of clinically diagnosed phobia or evidence of substantial bodily injury as a result of such fear.

All of the above motions were scheduled for oral argument on December 28, 1988. On that date, the court heard argument on the issue of the constitutionality of N.J. Stat. Ann. Sec. 2A:14-22 and postponed any argument on the remaining motions until the court ruled on the motions with respect to N.J. Stat. Ann. Sec. 2A:14-22.

BACKGROUND

Plaintiff Stephen Juzwin is a 68-year-old former employee of Johns-Manville Corp. and of Ruberoid Company who has been diagnosed as having asbestos-related ailments. He alleges that his

condition was caused at least in part by exposure to asbestos fiber during his employment with Johns-Manville for a brief period in approximately 1941 and with Ruberoid from 1948 until 1972. Specifically, plaintiff alleges that he was exposed to raw asbestos fiber supplied by the defendants while mixing various components used in the manufacture of asbestos products and that, as a proximate result, he suffered injury.

The plaintiff admits to being diagnosed as having asbestosis in 1982 and concedes that he did not institute legal proceedings within the applicable two-year statute of limitations.

DISCUSSION

I. Attorney General's Motion to Intervene

Given that an issue of the constitutionality of N.J. Stat. Ann. Section 2A:14-22, the state tolling statute, has been raised by defendants in this action, the motion of the Attorney General to intervene as a defendant pursuant to 28 U.S.C. Section 2403(b), solely for the purposes of defending the constitutionality of N.J. Stat. Ann. Sec. 2A:14-22, is granted.[1]

II. New Jersey's Tolling Statute

Because it is conceded for the purposes of this motion that plaintiff did not institute suit within the two year period of limitations, plaintiff may maintain this action only if the statute of limitations was tolled pursuant to N.J. Stat. Ann. Sec. 2A:14-22. Defendants argue that this action is barred by the New Jersey

1. None of the parties opposed this motion.

statute of limitations because New Jersey's tolling statute acts in violation of the Commerce Clause of the U.S. Constitution. In order to examine the challenge to the New Jersey tolling statute asserted by defendants, it is first necessary to review the history of the statute.

Originally, N.J. Stat. Ann. Sec. 2A:14-22 provided that the limitations period would be tolled for the amount of time that any foreign corporate defendant was not "represented in this state by any person or officer upon whom summons or other original process may be served . . . ." In *Coons v. American Honda Motor Company*, 94 N.J. 307 (1983) ("*Coons I*"), the New Jersey Supreme Court held that the tolling statute violated the Commerce Clause of the U.S. Constitution because the only way for a foreign corporation to gain the "representation" required by N.J. Stat. Ann. Sec. 2A:14-22 was to obtain a certificate of authority to transact business in New Jersey. Such a requirement was held to be a forced licensure, since those corporations which did not obtain a certificate of authority to do business in New Jersey would not receive the benefits of the tolling statute.

In 1984, shortly after the *Coons I* decision, the New Jersey legislature amended N.J. Stat. Ann. Sec. 2A:14-22 to provide:

> . . . A corporation shall be deemed represented for purposes of this section if the corporation has filed with the Secretary of State a notice designating a representative to accept service of process.

This amendment to the tolling statute permits a foreign corporation to designate an agent within New Jersey in order to avoid the tolling of the statute of limitations without being required to obtain a certificate of authority from the Secretary of State. Defendants

now claim that this amendment to the statute was not sufficient to cure the constitutional defect because it forces foreign corporations to choose between indefinite tolling of the statute of limitations or submitting themselves to the general jurisdiction of the courts of New Jersey when the due process requirements for personal jurisdiction may not have been met.

In support of their argument, defendants cite the recent Supreme Court decision of *Bendix Autolite Corp. v. Midwesco Enterprises, Inc.*, ____ U.S. ____ , 108 S.Ct. 2218, 56 U.S.L.W. 4648, No. 87-367, slip op. (June 17, 1988). *Bendix* involved the Ohio tolling statute, which provided that the statute of limitations would be tolled whenever a foreign corporation was not present in the state. To be "present" in Ohio, a corporation was required to appoint an agent for service of process, which by statute would operate as consent to the general jurisdiction of the Ohio courts. The Court held that the statute created an unconstitutional burden on interstate commerce, stating:

> Requiring a foreign corporation to appoint an agent for service in all cases and to defend itself with reference to all transactions, including those in which it did not have the minimum contacts necessary for supporting personal jurisdiction, is a significant burden.

Slip op. at 5.

Unlike the Ohio statutory scheme, however, the New Jersey statutes regulating corporations do not compel the conclusion that designation of an agent for service of process subjects a foreign corporation to the general jurisdiction of the New Jersey courts. The Court in its *Bendix* opinion explicitly stated that the Ohio

statutory language precluded designation of an agent for service without submitting to the general jurisdiction of the Ohio courts:

> The suggestion that Midwesco had the simple alternatives of designating an agent for service of process in its contract with Bendix or *tendering an agency appointment to the Ohio Secretary of State* is not persuasive. Initially, there is *no statutory support for either option,* and it is speculative that either device would have satisfied the Ohio requirements for the continued running of the limitations period.

Id. at 6 (emphasis added). In contrast, the New Jersey statutory scheme expressly permits tendering an agency appointment to the Secretary of State as a means of preventing the tolling of the statute of limitations. This court concludes that, unlike the Ohio statute, the New Jersey statute does support the possibility of designation by a foreign corporation of a representative for the purposes of preventing the statute of limitations from tolling without at the same time subjecting the corporation to the general jurisdiction of the New Jersey courts.

This court has the power to engage in what has been called "judicial surgery" to enforce a statute and avoid an unconstitutional result through appropriate construction of the statutory language. *See, First Family Mortgage Corp. v. Durham*, 108 N.J. 277, 290 (1987), *app. dism. as moot*, ____ U.S. ____, 108 S.Ct. 2863 (1988). As stated in *Durham*, "The relevant issue in each case is whether the Legislature would want the statute to survive." 108 N.J. at 290. It is clear from the legislature's rapid response to the *Coons I* decision, and from the statement accompanying the New Jersey Senate bill amending Section

2A:14-22,[2] that it would want the statute to survive. The court concludes that the statute as amended supports a reasonable construction which avoids an unconstitutional result. *See, e.g. Johnson v. Robinson*, 415 U.S. 361, 367 (1974); *United States v. Thirty-seven Photographs*, 402 U.S. 363, 369 (1971), *reh. den.*, 403 U.S. 924 (1971).

The New Jersey statute does not on its face require submission to the general jurisdiction of the courts of New Jersey when a representative is named solely for the purposes of avoiding tolling of the statute of limitations pursuant to N.J. Stat. Ann. Sec. 2A:14-22. Even though the tolling statute only applies to foreign corporations, it does not *require* a waiver of a right or privilege, such as the right to challenge the court's in personam jurisdiction in actions unrelated to New Jersey. Rather, the statute is silent on the question.[3] Thus, the court concludes that N.J. Stat. Ann.

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2. The accompanying statement to Senate Bill No. 953, June 18, 1984, stated:

> Senate Bill No. 953 was introduced in response to a recent New Jersey Supreme Court decision, *Coons v. American Honda Co., Inc.*, 94 N.J. 327 [sic] (1983). . . . The filing of a notice designating a representative to accept process is a less burdensome requirement than obtaining a certificate to do business. Therefore, by providing that a foreign corporation would be deemed represented for purposes of N.J. S. 2A:14-22 if such a notice were filed, Senate Bill No. 953 is intended to meet the Supreme Court's objections as stated in the Coons decision and thereby assist New Jersey citizens to pursue their claims against foreign corporations.

3. N.J. Rule 4:4-4(c) provides for *in personam* jurisdiction over a corporation by serving "any person authorized by appointment or by law to

(Cont'd)

Sec. 2A:14-22 is not on its face a burden on interstate commerce and is therefore not a per se violation of the Commerce Clause.

Recognizing that the interests of a corporation in being exempt from the tolling provision are important, *see Bendix*, slip. op. at 5, the court must next determine whether any burden on a foreign corporation caused by compliance with the designation requirement of N.J. Stat. Ann. Sec. 2A:14-22 is greater than the provision's benefit to the state.

A. Extent of Burden on Foreign Corporations

Because the statute does not on its face subject a foreign corporation which has designated an agent pursuant to section 2A:14-22 to the general jurisdiction of the New Jersey courts, the court looks to what burdens such a designation would impose on foreign corporations. Defendants contend, and the court agrees,

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(Cont'd)

receive service of process on behalf of the corporation." Such jurisdiction has been held to extend to the outermost limits of due process, regardless of the extent of any of the corporation's activities in New Jersey. *Avdel Corp. v. Mecure*, 58 N.J. 264 (1971). However, this rule does not contemplate the situation created by N.J. Stat. Ann. 2A:14-22, where designation of an agent is permitted solely for the purpose of avoiding the tolling of the statute of limitations, without requiring a corporation to obtain a certificate to do business in New Jersey. In addition, Rule 4:4-4(c) does not preclude limited designations and is silent with respect to whether general *in personam* jurisdiction could be asserted over a corporation making a limited designation. In this court's view, if the Secretary of State accepts a limited designation and if an agent is authorized to accept service of process only for certain kinds of actions (i.e., actions having a nexus with New Jersey), then the agent would *not* be "authorized by appointment . . . to receive service of process on behalf of the corporation" under Rule 4:4-4(c) with respect to actions having no nexus with the state.

that a foreign corporation, in light of the language of the statute, might reasonably fear that compliance with the designation provision would subject it to the jurisdiction of New Jersey courts in actions unrelated to the state of New Jersey. However, such a fear, even if reasonable, does not necessarily place an unconstitutional burden on interstate commerce. The language of the statute itself does not equate designation of an agent for the purposes of the tolling statute with submission to the general jurisdiction of New Jersey. Although it would not be unreasonable to fear subjection to general jurisdiction as a result of compliance with the statute, the court concludes that it also would not be unreasonable to expect a foreign corporation to make a reasonable inquiry as to the potential consequences of designation of an agent pursuant to N.J. Stat. Ann. Sec. 2A:14-22.

The record before the court shows that, were a corporation to make an inquiry, it would have been informed that the office of the Secretary of State of New Jersey would accept designations filed by foreign corporations which appointed a representative for service of process but conditioned the representation as existing only for causes of action having a nexus with New Jersey.[4] Such

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4. In addition, the Attorney General has cited two recent New Jersey cases which have upheld the validity of N.J. Stat. Ann. Sec. 2A:14-22, and in doing so have interpreted the statute to read that there is no waiver of a foreign corporation's ability to contest service of process or personal jurisdiction when a representative is named for the purposes of meeting the requirements of the tolling statute. *See, Armenti v. Carey Canada*, No. L-45449-87, slip op. at 5 (Law Div. November 7, 1988); *Grossman v. Club Med et al.*, No. L-045449-87, slip op. (Law Div.) (not yet transcribed). The court concludes that it is reasonable to interpret the statute as not requiring foreign corporations to submit to the jurisdiction of New Jersey in cases where there are insufficient contacts with the state for the purposes of personal jurisdiction over the corporation.

a condition is not precluded by the New Jersey statute[5] and avoids the hazard asserted by defendants of exposure to personal jurisdiction with respect to causes of action unrelated to New Jersey activities. In the court's view, corporations making a limited designation for the purposes of preventing tolling of the statute of limitations would only be subjecting themselves to the jurisdiction of New Jersey's courts with respect to actions arising from their activities in New Jersey.[6] A limited designation under the tolling statute places no greater burden on foreign corporations with respect to jurisdiction of the New Jersey courts than those corporations would normally face as a result of their activities in the state. Thus, such a limited designation itself imposes no unconstitutional burden on interstate commerce.

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5. As discussed *supra* at 8-9,n3, N.J. Rule 4:4-4(c) does not preclude a limited designation of an agent for service of process, and it is silent with respect to whether a limited designation would subject a corporation to the general jurisdiction of New Jersey courts. This court has determined that Rule 4:4-4(c) does not require an agent with a limited designation under N.J. Stat. Ann. Sec. 2A:14-22 to accept service of process for actions unrelated to New Jersey.

6. The possibility of designating an agent under Sec. 2A:14-22 and of limiting that agent's authority to accept service of process to suits having a nexus in the state of New Jersey distinguishes the New Jersey statutory scheme from the Ohio statute which was the subject of the *Bendix* opinion. In *Bendix*, the Court noted that there was no statutory authorization for the designation of an agent separate from obtaining a certificate to do business in Ohio, *Bendix*, slip op. at 6, and the Court did not address the issue of whether the filing of a limited designation could avoid the problem of submission to the state's general jurisdiction. The Court's statement that it was "likely" that a designation of an agent for service of process would subject a corporation to the general jurisdiction of the state, *Bendix*, slip op. at 7, was made in the context of a general agency appointment and does not preclude a contrary conclusion by this court in the context of a limited agency appointment.

Appendix B

When the statute is construed to allow designation of a representative without becoming subject to the general jurisdiction of New Jersey, the only burdens placed on a foreign corporation would be the act of making a reasonable inquiry as to the consequences of designation under the statute and the act of designating a representative. The court concludes that the burden of making a reasonable investigation is only a minimal burden. In addition, the mere naming of a representative without being required to register to do business and without becoming subject to the state's general jurisdiction certainly does not rise to the level of a "forced licensure". *See, Coons I*, 94 N.J. at 317 (holding that requirement of representation in order to avoid tolling of limitations period constituted "forced licensure" when only means for acquiring representation was to obtain certificate of authority to do business in New Jersey).

B. Local Benefits of the Tolling Provision

To determine whether the statute violates the Commerce Clause, the court is obligated to balance the minimal burdens on interstate commerce of inquiry and designation with the local purposes of the statute. *See, Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970) ("Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed is clearly excessive in relation the putative local benefits."'); *see also, Huron Portland Cement Co. v. City of Detroit*, 362 U.S. 440, 443 (1960); *Southern Pacific Co. v. Arizona*, 325 U.S. 761, 770-71 (1945).

The state of New Jersey has a legitimate interest in protecting the claims of its resident citizens, and N.J. Stat. Ann. Sec. 2A:14-22 attempts to meet this interest by preventing difficult-

to-locate foreign corporations from asserting the statute of limitations as a defense to suits. *See, e.g., G.D. Searle & Co. v. Cohn*, 455 U.S. 404 (1982) (recognizing valid state interests served by New Jersey tolling statute). In requiring a foreign corporation to designate a representative solely for the purposes of preventing the tolling of the statute of limitations, the statute does not require a corporation to waive or relinquish any rights or benefits. *Cf., Frost & Frost Trucking Co. v. Railroad Commission*, 271 U.S. 583, 593-4 (1926) (government may not condition receipt of benefits upon nonassertion of constitutional rights). As the court held above, a foreign corporation need not waive its right to contest the jurisdiction of a New Jersey court, since the New Jersey statutory scheme has been interpreted to permit a corporation to file a conditional designation of a representative. Such a designation would serve to limit the corporation's submission to in personam jurisdiction in New Jersey to actions which have a nexus to the state. The court concludes that New Jersey's strong interest in protecting the claims of its resident citizens outweighs whatever minimal burden the designation requirement and the investigation of the potential consequences of such a designation might place on interstate commerce. Thus, the court concludes that N.J. Stat. Ann. Sec. 2A:14-22 does not violate the Commerce Clause of the U.S. Constitution.[7]

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7. The court is aware that the recent opinion of Judge Lifland in *Robinson v. Visual Packaging, Inc., et al.*, No. 86-5059 (D.N.J. January 26, 1989) found that the New Jersey tolling statute places an unreasonable burden on interstate commerce, in violation of the Commerce Clause. The question is clearly a close one; however, this court's opinion diverges from the well-reasoned decision of Judge Lifland in its distinction between the Ohio statutory scheme in *Bendix* and that of New Jersey and in its evaluation of the extent of the burden imposed on interstate commerce by N.J. Stat. Ann. Sec. 2A:14-22.

Appendix B

Because the court concludes that N.J. Stat. Ann. Sec. 2A:14-22 is not unconstitutional, defendants' failure to designate a representative pursuant to that statute served to toll the statute of limitations. Defendants' motion to dismiss based on the statute of limitations is thus denied.

III. Amtorg's Summary Judgment Motion

Amtorg argues that plaintiff simply does not have sufficient evidence to show a nexus between Amtorg and the injuries sustained by plaintiff. Amtorg claims that plaintiff cannot show that he was exposed to any asbestos fiber supplied or brokered by Amtorg, and thus that summary judgment should be entered in favor of Amtorg.

In essence, Amtorg contends that plaintiff's only evidence linking Amtorg to plaintiff's injuries will be general references to the use of "Russian fiber" by employees at Ruberoid during the 1930's through the 1980's; ledger sheets which indicate that Amtorg brokered Russian asbestos fiber to Buck in 1948 but which do not indicate to which Ruberoid plant the asbestos might have been delivered; a brochure published by Amtorg in 1984 which indicates that in 1930, eighty-six percent of all Soviet-American trade was brokered through Amtorg, with no individual reference to asbestos fiber; and two invoices indicating that asbestos was ordered from Amtorg for the South Bound Brook plant but which do not in any way indicate that the asbestos was ever delivered. Amtorg argues that in the absence of *direct* evidence that Amtorg supplied asbestos fiber to the South Bound Brook Ruberoid plant and that plaintiff was exposed to any asbestos fiber supplied by Amtorg, plaintiff cannot recover against Amtorg.

Even though a particular item of evidence might not be

determinative of an ultimate issue to be proven at trial, if it is relevant and not excluded by a rule of evidence, it certainly may be introduced to be considered by the factfinder in combination with other items of evidence. Rule 401 of the Federal Rules of Evidence defines "relevant evidence" as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." All of the facts described above meet this test of relevance, and the court cannot conclude as a matter of law that the above facts, taken in combination, are insufficient to allow a jury to find that Amtorg more likely than not was a supplier of asbestos fiber to which the plaintiff was exposed.

The court concludes that summary judgment on this issue would be inappropriate at the present time. Plaintiff need not demonstrate through direct proof that he was exposed to fiber supplied by Amtorg, but such exposure may be proved through circumstantial evidence. Plaintiff has created an issue of fact with respect to Amtorg's supply of asbestos to Ruberoid and plaintiff's exposure to Amtorg's asbestos fiber, and this court cannot conclude at the present stage in the proceedings that plaintiff will be unable as a matter of law to prove its case against Amtorg.

Thus, the court will deny defendant Amtorg's motion for summary judgment and its alternative request to bar testimonial evidence of Russian fiber and introduction of the ledger sheets and Amtorg brochure referred to above.[8] The court does not at

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8. The court notes that plaintiff's opposition to defendant Amtorg's motion for summary judgment was received by counsel for Amtorg on December 23, 1988, and the court did not receive plaintiff's opposition until December 27, (Cont'd)

this time rule on defendant's request for limiting instructions, but will consider during the course of trial any limiting instructions requested by defendants.

IV. Plaintiff's Request For Discovery Sanctions Against ACL

Plaintiff asserts that it has evidence showing that ACL purchased the Johnson's Company's assets and is essentially the successor in interest to the Johnson's Company. Plaintiff served requests for admissions on defendant ACL relating to whether ACL is the successor in interest to Johnson's Co. and the authentication of certain documents it wishes to use at trial. Defendant ACL objected to these requests on the basis of the Quebec Business Concerns Records Act ("QBCRA").[9] Plaintiff now requests sanctions for ACL's refusal to make the requested admissions in the form of admission of plaintiff's documents into evidence and estoppel of ACL from denying its successorship in interest. ACL has cross-moved for a protective order, due to its asserted inability to comply with plaintiff's discovery requests.

The court first notes that the imposition of sanctions on ACL for objecting to requests for admissions when plaintiff has not first complied with the requirements of Fed. R. Civ. P. 36 would be inappropriate. Rule 36 provides:

(Cont'd)

the day before these motions were to be argued and well past the deadline for timely filing of opposition imposed by the General Rules of this court. The court did not consider plaintiff's opposition papers in ruling on this motion.

9. This act essentially prohibits the removal of documents and information characterized as business records from the Province of Quebec, even if production and removal of the documents is ordered by a court.

Appendix B

> The party who has requested the admissions may move to determine the sufficiency of the answers or objections. Unless the court determines that an objection is justified, it shall order that an answer be served. If the court determines that an answer does not comply with the requirements of this rule, it may order either that the matter is admitted or that an amended answer be served.

The court will thus deem plaintiff's request for sanctions as a motion to determine the sufficiency of defendant ACL's objections and will refer the matter to the magistrate for determination.[10]

V. Remaining Motions

The court does not rule at this time on the remaining motions pending before it. Rather, all of the remaining motions still pending before the court[11] will be set down for oral argument on Monday, April 24, 1989, at 2:00 p.m. Any further submissions by the parties with respect to these motions must be received by the court on

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10. As a result, ACL's cross-motion for a protective order will also be resolved by the magistrate.

11. These motions include plaintiff's motion to bar evidence of the employer's knowledge and conduct; plaintiff's motion to bar the defense of contributory negligence; plaintiff's motion for entry of an order holding that defendants' asbestos fiber was defective as a matter of law; plaintiff's request for a holding that Leonard J. Buck Co. and Amtorg Trading Corp. can be held strictly liable in tort as the distributors of asbestos fiber and defendant Amtorg's request for a holding that it cannot be held strictly liable; and defendants' motions regarding increased *risk* of cancer and cancerphobia. *The parties' submissions regarding the constitutionality of punitive damages in this case will be ruled upon by the court without oral argument.*

or before March 29, 1989, and any replies to such submissions must be received no later than April 12, 1989.

CONCLUSION

The motion of the Attorney General for the state of New Jersey to intervene for the purpose of defending the constitutionality of N.J. Stat. Ann. Sec. 2A:14-22 is granted.

Defendants' motion for summary judgment based upon the statute of limitations and the constitutionality of N.J. Stat. Ann. Sec. 2A:14-22 is denied.

Defendant Amtorg's motion for summary judgment, or in the alternative to bar certain evidence as irrelevant, is denied.

Plaintiff's request for discovery sanctions against ACL and ACL's request for a protective order are referred to the magistrate for determination.

The court will hear oral argument on the remaining motions which were originally scheduled for argument on December 28, 1988, on Tuesday, April 24, 1989 at 2:00 p.m.

s/ H. Lee Sarokin
H. LEE SAROKIN, U.S.D.J.

Date: February 27, 1989
Original to Clerk, U.S. District Court

Copy to:

Hon. Ronald J. Hedges, U.S. Magistrate

Appendix B

Garruto, Galex & Cantor, Esqs.
(Attn: Francis A. Tomes, Esq.)
P.O. Box 308
14 Old Bridge Turnpike
East Brunswick, NJ 08816
Attorneys for Plaintiffs

Cary Edwards, Attorney General of New Jersey
(Attn: Harry Haushalter, Deputy A.G.)
Department of Law and Public Safety
Division of Law, Financial Section
Richard J. Hughes Justice Complex
CN 112
Trenton, NJ 08625

Budd Larner Gross Picillo Rosenbaum Greenberg
& Sade, P.C.
(Attn: John J. Catino, Esq.)
150 John F. Kennedy Parkway, CN1000
Short Hills, NJ 07078-0999
Attorneys for Defendant-Third Party Plaintiff
Amtorg Trading Corp.

McCarter & English
(Attn: Honora M. Keane, Esq.)
Charles F. Rysavy, Esq.)
Four Gateway Center
100 Mulberry Street
Newark, NJ 07102
Attorneys for Defendant Carey Canada, Inc.

Goldfein & Joseph, P.C.
(Attn: David A. Katzenstein, Esq.
Scott I. Fegley, Esq.)

Appendix B

Blaine Building, Suite 201
330 Alexander Street
Princeton, NJ 08540
Attorneys for Defendants Asbestos Corporation Ltd.
and Bell Asbestos Mines, Ltd.

Bressler, Amery & Ross
(Attn: Gladys W. Orr, Esq.)
44 Whippany Road
Morristown, NJ 07960
Attorneys for Defendant, Metropolitan Life Insurance Co.

O'Donnell, Kennedy, Vespole & Piechta, Esqs.
(Attn: Leon B. Piechta, Esq.)
414 Eagle Rock Ave.
West Orange, NJ 07052
Attorneys for Defendant, Leonard J. Buck

APPENDIX C — ORDER GRANTING LEAVE TO APPEAL FILED NOVEMBER 7, 1988

ORDER ON MOTION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

DOCKET NO. AM-177-88-T3F
MOTION NO. M-836-88

BEFORE PART: C
JUDGE(S): PETRELLA
SHEBELL
LANDAU

D. ARMENTI, *et ux, et al*

v.

CAREY CANADA, INC., et al

MOTION FILED: OCTOBER 7, 1988

ANSWER(S) FILED:
OCTOBER 24, 1988 BY ATTORNEY GENERAL OF N.J.
OCTOBER 24, 1988 BY: Wilentz, Goldman & Spitzer for Plaintiffs

SUBMITTED TO COURT: OCTOBER 26, 1988

ORDER

THIS MATTER HAVING BEEN DULY PRESENTED TO THE COURT, IT IS ON THIS 4th DAY OF November, 1988, HEREBY ORDERED AS FOLLOWS:

Appendix C

MOTION BY
ASBESTOS CORP., LTD., AND BELL ASBESTOS MINES, LTD., FOR LEAVE TO APPEAL: GRANTED; OTHER

SUPPLEMENTAL:

Leave to appeal is granted. We grant summary disposition on the request of the Attorney General and summarily affirm the September 22, 1985 order for the reasons expressed in the September 16, 1988 oral opinion of Judge Mannion which effectively supplemented the May 27, 1988 oral opinion of Judge Keefe.

[Filed November 7, 1988]

FOR THE COURT:

s/ James J. Petrella
JAMES J. PETRELLA
P.J.A.D.

[Stamped]
I hereby certify that the foregoing is a true copy of the original on file in my office.

s/ R.E. Miller
Acting Clerk

APPENDIX D — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY DATED MARCH 6, 1989

CARY EDWARDS
Attorney General of New Jersey
R.J. Hughes Justice Complex
CN 112
Trenton, New Jersey 08625

By: HARRY HAUSHALTER
Deputy Attorney General
(609) 292-1527

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Honorable H. LEE SAROKIN

Civil Action No. 87-3876 (HLS)

STEPHEN JUZWIN, et al.

Plaintiff,

v.

ASBESTOS CORPORATION, LTD., et al.,

Defendants.

ORDER PERMITTING ATTORNEY GENERAL OF NEW JERSEY TO INTERVENE AS PLAINTIFF

THIS MATTER being opened to the Court on motion to

intervene by the Attorney General of New Jersey on the papers filed and the Court having reviewed the motion papers and being satisfied the 28 *U.S.C.* § 2403(b) permits the Attorney General of New Jersey to intervene in defense of a constitutional challenge to a State statute and further good cause appearing for the entry of this order;

IT IS on this 6th day of March, 1989;

ORDERED that the Attorney General of New Jersey be and hereby is permitted to intervene as a plaintiff in accordance with 28 *U.S.C.* § 2403(b) for the limited purpose of defending the constitutionality of *N.J.S.A.* 2A:14-22.

s/ H. Lee Sarokin
Honorable H. Lee Sarokin
United States District Judge

APPENDIX E — RELEVANT STATUTES

N.J. Stat. Ann. § 2A:14-22:

Nonresidence of person liable

If any person against whom there is any of the causes of action specified in sections 2A:14-1 to 2A:14-5 and 2A:14-8, or if any surety against whom there is a cause of action specified in any of the sections of article 2 of this chapter,[1] is not a resident of this State when such cause of action accrues, or removes from this State after the accrual thereof and before the expiration of the times limited in said sections, or if any corporation or corporate surety not organized under the laws of this State, against whom there is such a cause of action, is not represented in this State by any person or officer upon whom summons or other original process may be served, when such cause of action accrues or at any time before the expiration of the times so limited, the time or times during which such person or surety is not residing within this State or such corporation or corporate surety is not so represented within this State shall not be computed as part of the periods of time within which such an action is required to be commenced by the section. The person entitled to any such action may commence the same after the accrual of the cause therefor, within the period of time limited therefor by said section, exclusive of such time or times of nonresidence or nonrepresentation.

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1. Section 2A:14-16 et seq.

Appendix E

A corporation shall be deemed represented for purposes of this section if the corporation has filed with the Secretary of State a notice designating a representative to accept service of process.

Amended by L.1984, c. 131, § 1, eff. Aug. 23, 1984.

Senate Judiciary Committee Statement

Senate, No. 953—L.1984, c. 131

N.J.S. 2A:14-22 tolls the running of the statute of limitations in civil actions against foreign corporations that are not represented in New Jersey and thus cannot be reached with service of process. This bill would provide that a foreign corporation would be deemed represented in New Jersey for the purpose of N.J.S. 2A:14-22 if the corporation filed with the Secretary of State a notice designating a representative to accept service of process.

The bill was introduced in response to a recent New Jersey Supreme Court decision, Coons v. American Honda Co., Inc., 94 N.J. 327 (1983). In that decision, the court determined that in order to be "represented" in the context of N.J.S. 2A:14-22, a foreign corporation must obtain a certificate to do business in New Jersey. The court ruled that this requirement was in violation of the commerce clause of the U.S. Constitution in that it unduly burdened interstate commerce by requiring a foreign corporation engaged exclusively

in interstate commerce to obtain such a certificate.

The filing of a notice designating a representative to accept process is a less burdensome requirement than obtaining a certificate to do business. Therefore, by providing that a foreign corporation would be deemed represented for purposes of N.J.S. 2A:14-22 if such a notice were filed, S-953 is intended to meet the Supreme Court's objections as stated in the Coons decision and thereby assist New Jersey citizens to pursue their claims against foreign corporations.

N.J. Stat. Ann. 2A:14-1:

6 years

Every action at law for trespass to real property, for any tortious injury to real or personal property, for taking, detaining, or converting personal property, for replevin of goods or chattels, for any tortious injury to the rights of another not stated in sections 2A:14-2 and 2A:14-3 of this Title, or for recovery upon a contractual claim or liability, express or implied, not under seal, or upon an account other than one which concerns the trade or merchandise between merchant and merchant, their factors, agents and servants, shall be commenced within 6 years next after the cause of any such action shall have accrued.

This section shall not apply to any action for breach of any contract for sale governed by section

Appendix E

12A:2-725 of the New Jersey Statutes.

Amended by L.1961, c. 121, p. 723, § 1, eff. Jan. 1, 1963.

N.J. Stat. Ann. § 2A:14-2:

2 years; actions for injuries to person by wrongful act

Every action at law for an injury to the person caused by the wrongful act, neglect or default of any person within this state shall be commenced within 2 years next after the cause of any such action shall have accrued.

N.J. Stat. Ann. § 2A:14-3:

1 year; libel or slander

Every action at law for libel or slander shall be commenced within 1 year next after the publication of the alleged libel or slander.

N.J. Stat. Ann. § 2A:14-4:

Actions on lease, specialty, recognizance or award; 16 years; effect of payments; action on instrument under seal brought by merchant or financial institution; 6 years

Every action at law for rent or arrears of rent, founded upon a lease under seal, every action at

law upon a single or penal bill under seal for the payment of money only, upon an obligation under seal conditioned for the payment of money only, upon a recognizance or upon an award under the hands and seals of arbitrators for the payment of money only shall be commenced within 16 years next after the cause of any such action shall have accrued. If, however, any payment is made on any such lease, specialty, recognizance or award within or after such period of 16 years, an action thereon may be commenced within 16 years next after such payment, and not thereafter.

This section shall not apply to any action for breach of any contract for sale governed by N.J.S. 12A:2-725.

This section shall also not apply to any action founded upon an instrument under seal brought by a merchant or bank, finance company, or other financial institution. Any such action shall be commenced within 6 years next after the cause of any such action shall have accrued.

Amended by L.1961, c. 121, p. 723, § 2, eff. Jan 1, 1963; L.1979, c. 436, § 1, eff. Feb. 14, 1980.

N.J. Stat. Ann. § 2A:14-5:

20 years; judgments

A judgment in any court of record in this state may be revived by proper proceedings or an action

at law may be commenced thereon within 20 years next after the date thereof, but not thereafter. An action may be commenced on a judgment obtained in any other state or country within 20 years next after the date thereof or within the period in which a like action might be brought thereon in that state or country, whichever period is shorter, but not thereafter.

N.J. Stat. Ann. § 2A:14-8:

20 years; actions by state for real estate or rents

No person or body politic or corporate shall be sued or impleaded by the state of New Jersey for any real estate, or for any rents, revenues, issues or profits thereof, except within 20 years next after the right or title thereto or cause of such action shall have accrued.

N.J. Stat. Ann. § 14A:4-1:

Registered office and registered agent

(1) Every corporation organized for any purpose under any general or special law of this State and every foreign corporation authorized to transact business in this State shall continuously maintain a registered office in this State, and a registered agent having a business office identical with such registered office.

(2) The registered office may be, but need not

be, the same as a place of business of the corporation which it serves.

(3) The registered agent may be a natural person of the age of 21 years or more, or a domestic corporation or a foreign corporation authorized to transact business in this State, whether or not any such agent corporation is organized for a purpose or purposes for which a corporation may be organized under this act.

(4) The designation of a principle or registered office in this State and of a registered agent in charge thereof by any corporation of this State or by any foreign corporation authorized to transact business in this State, as in force on the effective date of this act, shall continue with like effect as if made hereunder until changed pursuant to this act.

N.J. Stat. Ann. § 14A:4-2:

Function of registered agent and office; service of process, notice or demand

(1) Every registered agent shall be an agent of the corporation which has appointed him, upon whom process against the corporation may be served.

(2) Whenever any law of this State requires or permits any notice or demand to be given to or made upon a domestic corporation or a foreign

corporation authorized to transact business in this State, its officers or directors, such notice or demand may be sent by mail or otherwise, as the law may require or permit, to the registered office of the corporation in this State, and such notice so given or demand so made shall be sufficient notice or demand.

(3) The provisions of this section shall not exclude any other method provided by law for service of process upon a corporation, domestic or foreign, or for service of a notice or demand upon such corporation, its officers or directors.

(4) Whenever any law of this State requires that any certificate, report or statement made, published, filed or recorded by any corporation, domestic or foreign, state the residence or post office address of any incorporator, shareholder, director or officer, it shall be sufficient if the address of the registered office of the corporation in this State is stated.

N.J. Stat. Ann. § 14A:4-3:

Change of registered office or registered agent

(1) A domestic corporation or a foreign corporation authorized to transact business in this State may change its registered office or its registered agent, or both. When the registered office is changed, or when the registered agent is changed, or dies, resigns or becomes disqualified,

the corporation shall, by resolution of the board, forthwith fix the address of the new registered office or designate the successor registered agent or both, as the case may be.

(2) Such corporation shall forthwith file in the office of the Secretary of State a certificate executed on behalf of the corporation setting forth

(a) the name of the corporation;

(b) if the registered agent is not being changed, the name of the registered agent;

(c) if the registered agent is being changed, the names of the registered agent being succeeded and of the successor registered agent;

(d) if the registered office is not being changed, the address of the then registered office;

(e) if the registered office is being changed, the address of the registered office immediately prior to the change, and the address of the new registered office;

(f) that the address of its registered office and the address of its registered agent will be identical after the change; and

(g) that the change in registered office, or registered agent, or both, is made pursuant to resolution of the board.

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(3) The registered agent of one or more domestic or foreign corporations may change the registered office of such corporation or corporations to another address in the same municipality or county of this State by filing in the office of the Secretary of State a certificate executed by such agent and setting forth

(a) the names of all the corporations whose registered offices are being changed and for which he or it is the registered agent, listed in alphabetical order;

(b) the address of the registered office of each such corporation immediately prior to the change, and the address of the new registered office;

(c) that the address of the registered office of each such corporation and the address of its registered agent will be identical after the change; and

(d) a statement that at least 20 days' prior notice of the change has been given to each such corporation in writing.

The change of the registered office of each of the corporations named in the certificate shall become effective upon the date of such filing or at such later time, not to exceed 30 days after the date of filing, as may be set forth in the certificate.

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N.J. Stat. Ann. § 14A:4-4:

Resignation of registered agent

(1) The registered agent of a domestic corporation or a foreign corporation authorized to transact business in this State may resign by complying with the provisions of this Section.

(2) The registered agent shall serve a notice of resignation by certified mail, return receipt requested, upon the president, or any vice president, or the secretary or treasurer of the corporation at the address last known to the agent, and shall make an affidavit of such service. If such service cannot be made, the affidavit shall so state, and shall state briefly why such service cannot be made. The affidavit, together with a copy of the notice of resignation, shall be filed in the office of the Secretary of State.

(3) Such resignation shall become effective upon the expiration of 30 days after the filing in the office of the Secretary of State of the affidavit under this section or upon the designation by the corporation of a new registered agent pursuant to this act, whichever is earlier. If the corporation fails to designate a new registered agent within said 30-day period, the corporation shall thereafter be deemed to have no registered agent or registered office in this State.

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N.J. Stat. Ann. § 14A:4-5:

Annual report to secretary of state

(1) Every domestic corporation and every foreign corporation authorized to transact business in this State shall file in the office of the Secretary of State, within the time prescribed by this section, an annual report setting forth

(a) the name of the corporation and, in the case of a foreign corporation, the jurisdiction of its incorporation;

(b) the address of the registered office of the corporation in this State, and the name of its registered agent in this State at such address, and, in the case of a foreign corporation, the address of its main business or headquarters office;

(c) the names and addresses of the directors and officers of the corporation; and

(d) the date appointed for the next annual meeting of the shareholders for the election of directors.

(2) Such report shall be filed within 30 days after the time appointed for holding the annual election of directors, commencing with the time appointed for the first annual election of directors following the date of incorporation or of registering to transact business.

(3) If the report is not so filed, the corporation shall, after written demand therefor by the Secretary of State by certified mail addressed to the corporation at the last address appearing of record in his office, forfeit to the State a penalty of $200.00 for each report required to have been filed not more than 5 years prior thereto and remaining unfiled, to be recovered with costs in a civil action prosecuted by the Attorney General. No corporation shall be subject to penalty if it shall, within 30 days after such written demand, file the reports required by law and shall pay to the Secretary of State a fee of $10.00 for the filing of each such report. In lieu of such civil action, the Secretary of State, after expiration of such 30-day period, may issue a certificate to the Clerk of the Superior Court that the corporation is indebted for the payment of such penalty, and thereupon the Clerk shall immediately enter upon his record of docketed judgments the name of such corporation as the judgment debtor, and of the State as the judgment creditor, a statement that the penalty is imposed under this section, the amount of the penalty, and the date of such certificate. Such entry shall have the same force as a judgment docketed in the Superior Court. The Secretary of State within 5 days after such entry shall give notice thereof to the corporation by certified mail addressed to the corporation at the last address appearing of record in his office.

(4) The Secretary of State shall furnish annual report forms, shall keep in his office all such

reports and shall prepare an alphabetical index thereof, which reports and index shall be open to public inspection at proper hours.

Cal. Civ. Proc. Code § 351:

Absence from state; effect on limitation period

EXCEPTION, WHERE DEFENDANT IS OUT OF THE STATE. If, when the cause of action accrues against a person, he is out of the State, the action may be commenced within the term herein limited, after his return to the State, and if, after the cause of action accrues, he departs from the State, the time of his absence is not part of the time limited for the commencement of the action.

(Enacted 1872.)

Colo. Rev. Stat. § 13-80-118:

Absence or concealment of a party subject to suit

If, when a cause of action accrues against a person, the person is out of this state and not subject to service of process or has concealed himself, the period limited for the commencement of the action by any statute of limitations shall not begin to run until he comes into this state or while he is so concealed. If, after the cause of action accrues, he departs from this state and is not subject to service of process or conceals

himself, the time of his absence while not subject to the service of process or the time of his concealment while not subject to service of process shall not be computed as a part of the period within which the action must be brought.

(Repealed and reenacted Laws 1986, S.B.69, § 1.)

Del. Code Ann., tit. 10, § 8117:

Defendant's absence from State

If at the time when a cause of action accrues against any person, he is out of the State, the action may be commenced, within the time limited therefor in this chapter, after such person comes into the State in such manner that by reasonable diligence, he may be served with process. If, after a cause of action shall have accrued against any person, he departs from and resides or remains out of the State, the time of his absence until he shall have returned into the State in the manner provided in this section, shall not be taken as any part of the time limited for the commencement of the action. (Code 1852, § 2751; 20 Del. Laws, c. 594; 25 Del. Laws, c. 234; Code 1915, § 4680, Code 1935, § 5138; 10 Del. C. 1953, § 8116.)

Hawaii Rev. Stat. § 657-18:

Extension by absence from State

If at any time when any cause of action

in this part or section 663-3 accrues ny person, the person is out of the State, on may be commenced within the terms respectively limited, after the return of the person into the State, and if, after the cause of action has accrued, the person departs from and resides out of the State, the time of the person's absence shall not be deemed or taken as any part of the time limited for the commencement of the action. [CC 1859, § 1041; RL 1925, § 2652; RL 1935, § 3923; R. 1945, § 10434; RL 1955, § 241-17; HRS § 657-18; am L 1972, c 105, § 1(j); am imp L 1984, c 90, § 1]

Hawaii Rev. Stat. § 480-24:

Limitation of actions

Any action to enforce a cause of action arising under this chapter shall be barred unless commenced within four years after the cause of action accrues, except as otherwise provided in section 480-22. For the purpose of this section, a cause of action for a continuing violation is deemed to accrue at any time during the period of the violation. [L 1961, c 190, § 22, Supp, § 205A-22; HRS § 480-24]

Ill. Rev. Stat., Ch. 110, § 13-208:

Absence from State.

§ 13-208. Absence from State. (a) If, when

the cause of action accrues against a person, he or she is out of the state, the action may be commenced within the times herein limited, after his or her coming into or return to the state; and if, after the cause of action accrues, he or she departs from and resides out of the state, the time of his or her absence is no part of the time limited for the commencement of the action.

(b) For purposes of subsection (a) of this Section, no person shall be considered to be out of the State or to have departed from the State or to reside outside of the State during any period when he or she is subject to the jurisdiction of the courts of this State with respect to that cause of action pursuant to Sections 2-208 and 2-209 of this Act, Section 10-301 of "The Illinois Vehicle Code",[1] Section 111 of "The Business Corporation Act",[2] or any other statute authorizing service of process which would subject that person to the jurisdiction of the courts of this State. If a person files an action in a court of this State and attempts to secure service of process upon a defendant pursuant to a statute referred to in the preceding sentence, but does not obtain service of process upon such defendant, such defendant shall not be considered to be subject to the jurisdiction of the courts of this State at the time such action was

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1. Chapter 95½, ¶ 10-301.

2. Chapter 32, ¶ 157.111 (repealed; now ch. 32, ¶ 5.25).

filed, for purposes of the preceding sentence of this section. This subsection (b) of Section 13-208 of this Act shall apply only to actions commenced after October 1, 1973.

P.A. 82-280, § 13-208, eff. July 1, 1982. Amended by P.A. 83-707, § 1, eff. Sept. 23, 1983.

Kan. Stat. Ann. § 60-517:

When defendant out of state.

If when a cause of action accrues against a person he or she be out of the state, or has absconded or concealed himself or herself, the period limited for the commencement of the action shall not begin to run until such person comes into the state, or while he or she is so absconded or concealed, and if after the cause of action accrues he or she depart from the state, or abscond or conceal himself or herself, the time of the absence or concealment shall not be computed as any part of the period within which the action must be brought. This section shall not apply to extend the period of limitation as to any defendant whose whereabouts are known and upon whom service of summons can be effected under the provisions of article 3 of this chapter.

Appendix E

Md. Cts. and Jud. Proc. Ann. § 5-204:

Denial of defense of limitations to foreign corporations or foreign limited partnerships.

A foreign corporation or foreign limited partnership required by law to qualify or register to do business in the State or a person claiming under the foreign corporation or foreign limited partnership, may not benefit from any statute of limitations in an action at law or suit in equity:

(1) Arising out of a contract made or liability incurred by the foreign corporation or foreign limited partnership while doing business without having qualified or registered; or

(2) Instituted while the foreign corporation or foreign limited partnership is doing intrastate or interstate or foreign business in the State without having qualified or registered. (An. Code 1957, art. 23, § 93; 1973, 1st Sp. Sess., ch. 2, § 1; 1981, ch. 801, § 2.)

Okla. Stat. Ann., tit. 12, § 98:

Absense or flight of defendant — Effect of other laws.

When a cause of action accrues against a person and that person is out of the state or has concealed himself, the period limited for the commencement of the action shall not begin to run until he comes into the state, or while he is concealed. If, after a cause of action accrues against a person and that person leaves the state or conceals himself, the time of his absence or

concealment shall not be computed as any part of the period within which the action must be brought. Provided, however, that if any statute which extends the exercise of personal jurisdiction of courts over a person or corporation based upon service outside this state, or based upon substituted service upon an official of this or any other state or nation, or based upon service by publication permits the courts of this state to acquire personal jurisdiction over the person, the period of his absence or concealment shall be computed as part of the period within which the action must be brought.

Wis. Stat. § 180.847:

Transacting business without certificate of authority.

(1) No foreign corporation transacting business or acquiring, holding or disposing of property in this state without a certificate of authority, if a certificate of authority is required under this chapter, shall be permitted to maintain or defend a civil action or special proceeding in any court of this state, until such corporation shall have obtained a certificate of authority. Nor shall a civil action or special proceeding be maintained in any court of this state by any foreign corporation or a successor or assignee of such corporation on any right, claim or demand arising out of the transaction of business or the acquiring, holding or disposing of property by such corporation in this state at a time when such corporation was

without such certificate of authority until a certificate of authority shall have been obtained by such corporation or by a corporation which has acquired all or substantially all of its assets.

(2) The failure of a foreign corporation to obtain a certificate of authority to transact business in this state shall not impair the validity of any contract or act of such corporation or of its title to property in this state.

(3) A foreign corporation which transacts business, acquires, holds or disposes of property in this state without a certificate of authority, if a certificate of authority is required under this chapter, shall be liable to this state, for the years or parts thereof during which it transacted business or acquired, held or disposed of property in this state without a certificate of authority, in an amount equal to all fees and other charges which would have been imposed by this chapter upon such corporation had it duly applied for and received a certificate of authority to transact business in this state as required by this chapter and thereafter filed all reports required by this chapter and in addition thereto it shall be liable for a penalty of 50 per cent of such amount. Such fees and penalty shall be paid before a certificate of authority is issued.

(4) A foreign corporation transacting business or acquiring, holding or disposing of property in this state without a certificate of authority, if a

certificate of authority is required under this chapter, shall by so doing be deemed to have thereby appointed the secretary of state as its agent and representative upon whom any process, notice of demand may be served in any action or proceeding arising out of or relating to any business so transacted, or property acquired, held or disposed of within this state. Service of such process notice or demand shall be made by serving a copy upon the secretary of state or by filing such copy in his office, and such service shall be sufficient service upon said foreign corporation, provided that notice of such service and a copy of the process, notice or demand are within 10 days thereafter sent by mail by the plaintiff to the defendant at its last known address, and that the plaintiff's affidavit of compliance herewith is appended to the process, notice or demand. The secretary of state shall keep a record of all such processes, notices and demands which shows the day and hour of service.

(5) Nothing herein contained shall limit or effect the right to serve any process, notice or demand required or permitted by law to be served upon a foreign corporation in any other manner now or hereafter permitted by law.

Appendix E

28 U.S.C. § 1292:

Interlocutory decisions

(a) The courts of appeals shall have jurisdiction of appeals from:

(1) Interlocutory orders of the district courts of the United States, the United States District Court for the District of Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, or of the judges thereof, granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court;

(2) Interlocutory orders appointing receivers, or refusing orders to wind up receiverships or to take steps to accomplish the purposes thereof, such as directing sales or other disposals of property;

(3) Interlocutory decrees of such district courts or the judges thereof determining the rights and liabilities of the parties to admiralty cases in which appeals from final decrees are allowed;

(4) Judgments in civil actions for patent infringement which are final except for accounting.

(b) When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which

there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals may thereupon, in its discretion, permit an appeal to be taken from such order: *Provided, however,* That application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order. June 25, 1948, c. 646, 62 Stat. 929; Oct. 31, 1951, c. 655, § 49, 65 Stat. 726; July 7, 1958, Pub.L. 85-508, § 12(e), 72 Stat. 348; Sept. 2, 1958, Pub.L. 85-919, 72 Stat. 1770.

APPENDIX F — ORDER DENYING PETITION FOR REHEARING OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 89-5420

STEPHEN JUZWIN and MARY JUZWIN, his wife
V.
ASBESTOS CORPORATION LTD., et al.

CAREY CANADA, INC., *Appellant*

(D.C. Civil No. 87-3876)

PRESENT: HIGGINBOTHAM, *Chief Judge,* SLOVITER, BECKER, STAPLETON, MANSMANN, GREENBERG, HUTCHINSON, SCIRICA, COWEN and NYGAARD, *Circuit Judges,* and SEITZ, *Senior Circuit Judge.**

The petition for rehearing filed by appellee having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges in active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is DENIED.

BY THE COURT,

s/ Becker
Circuit Judge

DATED: May 9, 1990

* As to panel rehearing only.